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No. _____

In The

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under the doctrine of ancillary jurisdiction the district court had jurisdiction to hear a motion to enforce a settlement agreement when the order which dismissed the case with prejudice does not incorporate the settlement agreement into it or specifically retain jurisdiction to enforce the settlement agreement.

PARTIES TO PROCEEDING

In addition to petitioner Realty One, Inc., the following individuals and entities are parties to the proceeding in the court below:

RE/MAX International, Inc.; A.E.B.T.S., Inc. d/b/a RE/MAX Crossroads Properties; T.M.A.T.N.B., Inc. d/b/a RE/MAX Affinity, Inc.; D.F.I., Inc. d/b/a RE/MAX Results; Joseph P. Grady, Inc. d/b/a RE/MAX Xpress; McGrew Realty, Inc. d/b/a RE/MAX Key Realty; Property Professionals, Inc. d/b/a RE/MAX Property Professionals; RE/MAX Advantage, Inc. d/b/a RE/MAX Advantage; RE/MAX Northeast Ohio Limited Partnership; Zames Realty, Inc. d/b/a RE/MAX Specialists In Real Estate; Realty Properties, Inc. d/b/a RE/MAX Realty Properties; True Independence Partnership d/b/a RE/MAX Independent Associates; R.E.P., Inc. d/b/a RE/MAX Realty, and Smythe, Cramer Co.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Real Living, Inc., a privately-owned corporation, is the parent company and owns 100% of Realty One, Inc. No publicly held company owns 10% or more of Realty One, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Realty One, Inc. respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 271 F.3d 633 (6th Cir. 2001). The opinion of the district court granting respondent's motion to enforce settlement agreement with Realty One, Inc. (App., *infra*, 39a-66a) is unreported. The order of the district court dismissing the case with prejudice (App., *infra*, 67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2001).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1; "The judicial Power shall

extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States. . . . " U.S. CONST. art. III, § 2, cl. 1; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. Amend. X. Pursuant to this Court's Rule 14.1(f) Federal Rule of Civil Procedure is set forth at App., *infra*, 75a-76a.

STATEMENT OF THE CASE

I. The Proceeding Below.

A. *The case is settled and dismissed with prejudice.* On July 14, 2000, the district court entered an order dismissing this action with prejudice. The order stated that the parties had entered into a settlement agreement the prior day, that the case was "dismissed with prejudice" and that "any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." App., *infra*, at 67a ("dismissal order"). The dismissal order did not state that the settlement agreement was incorporated into it or that the court specifically retained jurisdiction to enforce the settlement agreement.

The previous day the parties entered into a settlement agreement after three days of negotiations supervised, in part, by the district court. With the assent of the parties, and in their presence, the district court dictated the terms of the settlement on the record. App., *infra*, at 68a-74a ("July 13th Settlement"). The agreement provided that this action would be dismissed with prejudice but

did not request that the district court retain jurisdiction to enforce the settlement agreement or for any other purpose. App., *infra*, at 70a.

B. *The complaint, appeal, trial, and mistrial.* In 1994, Re/Max International, Inc. ("Re/Max International") and several of its franchisees (collectively "Re/Max") filed the initial complaint in this action. Re/Max International sells franchises to persons who, in turn, sell residential real estate under the Re/Max system. The defendants were Realty One, Inc., ("Realty One"), the largest residential real estate company in Northern Ohio, and its largest competitor, Smythe Cramer Co. ("Smythe"). The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, 28 U.S.C. § 1337, and principles of supplemental jurisdiction, 28 U.S.C. § 1367. Generally, the complaint alleged that Realty One and Smythe had engaged in a conspiracy and anti-competitive conduct in violation of the federal and state antitrust laws to preclude Re/Max from competing in Northern Ohio.

In 1996, the district court entered summary judgment in favor of Realty One and Smythe. The Sixth Circuit reversed that decision, finding a dispute as to material facts, and remanded the case for trial to the district court. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999).

A jury trial commenced on April 7, 2000, before the Honorable David Dowd, who had presided over the case virtually from its inception. After approximately three months in trial, the court declared a mistrial with the

agreement of counsel for Re/Max. The case was transferred to Judge Gwin for retrial.

C. *The parties fail to agree on a more formal settlement agreement.* After entry of the dismissal order, the parties discussed the preparation of a more formal agreement concerning the settlement as contemplated by the July 13th Settlement. The discussions were unsuccessful. Realty One, however, complied with, and continues to abide by, all of the financial and business terms of the complete and binding July 13th Settlement.

On September 5, 2000, Re/Max filed a Motion to Enforce Settlement Agreement against Realty One. The motion claimed that Realty One breached the July 13th Settlement by not negotiating and executing a more formal settlement agreement. Re/Max requested that the court order Realty One to comply with the terms of either draft agreement attached to the motion. One draft was a modified version of a settlement agreement rejected by Realty One as inconsistent with the July 13th Settlement ("Re/Max draft"). The other draft was a variation of the first which, according to Re/Max, was the product of ongoing negotiations with Smythe to which Realty One was not a party ("Smythe draft"). Realty One opposed the motion noting that the court did not have jurisdiction in view of the dismissal order and that it objected to the terms of the Re/Max and Smythe drafts because they far exceeded the agreement reached on July 13th. A similar motion filed against Smythe was settled before the district court ruled. The district court did not hold an evidentiary hearing.

II. The Opinions Below.

A. *The District Court's Order.* On September 14, 2000, the district court entered an order captioned "Judgment." App., *infra*, at 39a. First, the court rejected Realty One's claim that it lacked jurisdiction to hear the motion to enforce. Citing this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), the court stated that "supplemental jurisdiction allows a federal court to retain jurisdiction over future enforcement of a settlement agreement." App., *infra*, at 44a. The court went on to find that "it is well settled that 'courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them.' " *Id.* (quoting *Aro Corp. v. Allied Witan*, 531 F.2d 1368, 1371 (6th Cir. 1975)). In view of these principles, the district court concluded that it had "expressly retained jurisdiction" because " 'all that is necessary [to do so] is that it be possible to infer that [the trial judge] did intend to retain jurisdiction.' . . . " App., *infra*, at 44a-45a (quoting *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985)). The court did not mention the fact that the July 14th dismissal order does not state that the court retained jurisdiction to enforce the settlement agreement or incorporate the settlement agreement.

Second, the district court concluded that Realty One had breached an agreement to negotiate and write formal settlement papers. The district court then wrote a new settlement agreement for the parties, taking most but not all of the basic terms of the July 13th transcript, adding expansive definitions and terms from the Smythe draft to which Realty One had objected, and inserting others. An appendix to the Judgment sets forth detailed dispute resolution procedures taken from the Smythe draft, App.,

infra, at 57a-66a. (The July 13th Settlement stated that all disputes would be settled through arbitration but did not specify the procedures. App., *infra*, at 71a.) The district court ordered Realty One to comply with the court's new settlement agreement.

B. *The Sixth Circuit Opinion.* The court of appeals affirmed the district court in a two-to-one decision. *Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633 (6th Cir. 2001). Initially, the court reviewed the record noting "[a]fter the parties reached a settlement agreement, the district court dismissed the case with prejudice without incorporating the terms of the agreement into its order or explicitly stating that it was retaining jurisdiction to enforce those terms." *Id.* at 636.

The circuit court began its analysis by noting that under *Kokkonen* a district court only retains jurisdiction to enforce a settlement agreement after dismissal of the action with prejudice in two limited circumstances: (1) where the agreement is incorporated into the order of dismissal; or (2) where the dismissal order specifically states that jurisdiction is being reserved to enforce the settlement agreement.

Two prior Sixth Circuit decisions which followed *Kokkonen* were dismissed as dicta. *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000); *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000). The court stated that *McAlpin* and *Caudill* only involved the "incorporation" and not the "express retention of jurisdiction" exception without explaining the significance of the distinction. *Re/Max Int'l*, 271 F.3d at 643-44. In any event, *Kokkonen*, the court noted, did not require the

conclusion reached in *McAlpin* – holding that after dismissal with prejudice the district court did not have jurisdiction to enforce a settlement agreement where the dismissal order only referred to the agreement and included only one provision from a multi-page agreement – stating that the decision misquoted Justice Scalia's opinion. *Id.* at 644. The court thus concluded that no "magic form of words" such as "expressly retained jurisdiction" is required by *Kokkonen*. *Id.* Citing its decision in *Aro Corp. v. Allied Witan*, 531 F.2d 1368 (6th Cir. 1975) for the proposition that "courts have inherent powers to enforce agreements executed in settlement," the court concluded that historically the Sixth Circuit had not adopted the type of narrow interpretation of jurisdiction represented by *McAlpin* and *Caudill*. *Id.* at 645.

In reviewing the post-*Kokkonen* decisions of other circuits, the court below drew support from *Bell v. Schexnayder*, 36 F.3d 447 (5th Cir. 1994) and *Ford v. Neese*, 119 F.3d 560 (7th Cir. 1997). Both decisions held that the dismissal order need not specifically state that jurisdiction is being reserved. Footnotes to the discussion about *Bell* and *Ford*, however, quote the dismissal orders from each case. Each dismissal order provided that the dismissal was without prejudice and reserved the right to hear the specific motion at issue in each case. *Re/Max Int'l*, 271 F.3d at 644, n.9, n.10.

The court discussed, but declined to follow, the decisions in *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37 (2d Cir. 1996) and *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995). Each of those cases held that for the court to retain jurisdiction to enforce the settlement agreement, an order dismissing the case with prejudice must specifically state

either that the agreement had been incorporated into the order or that jurisdiction was being retained to enforce the settlement agreement. *Re/Max Int'l*, 271 F.3d at 644. In addition, the court distinguished these two cases, along with *Kokkonen*, *McAlpin* and *Caudill*, based on the fact that they were dismissed under Fed. R. Civil Pro. 41(a)(1) rather than Rule 41(a)(2) which, the court stated, was the basis for dismissal in this case. *Id.* This distinction is important, the court noted, because the former provides for dismissal on stipulation of the parties but does not provide that the court can add conditions to the order. The latter however, provides for dismissal on motion of the plaintiff and expressly states that the court can add conditions to the dismissal order. The court did not mention the fact that the July 14th dismissal order, which cites the settlement agreement, does not refer to any provision from the Civil Rules or Re/Max's statement in its circuit court brief that the dismissal was not under Rule 41(a)(1).

In the remaining portions of its opinion the court affirmed the findings of the district court regarding the terms of its settlement agreement, essentially reviewing the new terms and provisions and determining that they were reasonable or that Realty One's objection to adding them was not well founded. *Id.* at 645-50.

C. *The Dissent Of Judge Wallace.* Circuit Judge Wallace, sitting by designation, dissented because "[t]he majority opinion is contrary to the Supreme Court's ruling in *Kokkonen* because it disregards the presumption against federal jurisdiction and expands the district court's jurisdiction to enforce the settlement agreement beyond the plain meaning of the dismissal order." *Re/Max Int'l*, 271 F.3d at 651 (Wallace, J., dissenting). According to

Judge Wallace, the majority's approach is also inconsistent with *McAlpin* and *Caudill*, both decided the prior year by the Sixth Circuit. *Id.* at 652.

Kokkonen holds that "to retain jurisdiction to enforce a settlement agreement, a district court must either include a 'separate provision [in the order of dismissal] (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporate the terms of the settlement agreement in the [dismissal] order" according to Judge Wallace. *Id.* at 650 (quoting *Kokkonen*). Here neither requirement was met. Thus, Judge Wallace noted, the district court did not have jurisdiction to hear the motion to enforce settlement.

Judge Wallace went on to state that the approach of the majority that "the district court's dismissal order . . . does not mean what it clearly says but, instead, means what this court thinks it should have said" is inconsistent with *Kokkonen* and the presumption against federal jurisdiction which can not be expanded by judicial decree. *Id.* at 651. While formalistic language is not required to reserve jurisdiction – and regardless of the merits of the approach used by the majority of trying to "divine the district court's intent" – the order in this case is clear and unambiguous and there is no circumstantial evidence to support a claim that the district court retained jurisdiction to enforce the settlement agreement Judge Wallace noted. *Id.* at 652. Judge Wallace concluded by stating that "[f]ederal jurisdiction is a precise doctrine. It does not exist here. I would rely upon the reasoning in *Kokkonen* and our own case law and hold that the district court did not have jurisdiction to enforce the settlement agreement.

Re/Max should have brought a separate claim in state court." *Id.*

REASONS FOR GRANTING THE WRIT

This is an important case because the decision of the circuit court below is directly contrary to this Court's decision in *Kokkonen,* to the decision of every post-*Kokkonen* federal circuit which has considered the issue, including those from the Sixth Circuit, and is erroneous. *See Re/Max Int'l,* 271 F.3d at 651 (Wallace, J., dissenting). The single question presented here concerning federal jurisdiction affords the Court a rare opportunity to consider and establish three important points: (1) the limits on federal jurisdiction and the lack of authority by the district courts to extend that judicial power by decree; (2) the authoritative nature of this Court's decisions and their binding nature on the lower federal courts; and (3) to resolve a split among the circuits created by the decision below on an important jurisdictional question thus avoiding an extension of district court jurisdiction by judicial decree into those areas reserved for the state courts.

I. The Circuit Court's Decision Is In Direct Conflict With This Court's Decision In *Kokkonen*.

In *Kokkonen,* this Court held that absent an independent jurisdictional base, a district court only has jurisdiction to hear a post dismissal with prejudice motion to enforce a settlement agreement when the moving party demonstrates that resolving the motion is within the

court's ancillary jurisdiction by, in effect, being an action on a court order. *Kokkonen*, 511 U.S. at 380-81. Otherwise, the action is outside the jurisdiction of the district court.

As this Court held in *Kokkonen*, a motion to enforce a settlement agreement is a suit on a contract and is thus presumed to be outside the court's jurisdiction. *Id.* at 378 ("enforcement of the settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction"). As in any other case, the proponent of jurisdiction must demonstrate either that there is an independent jurisdictional base (an issue not present here) or that the action is within the court's ancillary jurisdiction – courts do not have "inherent authority" to hear such a matter, even if the settlement agreement arose from a case once in the district court. *Id.* at 377, 380-81.

A matter is only within the district court's ancillary jurisdiction if it is either (1) sufficiently related to the claim on which the action is based or (2) directly related "to the court's power to protect its proceedings and vindicate its authority. . . . " *Id.* at 379-80. The first prong of ancillary jurisdiction assesses the relationship between the claims on which the suit is based and those over which it is requested that jurisdiction be asserted. *Id.* at 380. In contrast, the second focuses on whether an order of the court was "flouted or imperiled" by the claimed breach of the settlement agreement: that is, whether the suit on the settlement agreement is, in substance, a suit on the court order because either the order of dismissal incorporates the settlement agreement or the court specifically retained jurisdiction to enforce the settlement agreement. *Id.* at 380-81. Since *Kokkonen* held that the first

prong of ancillary jurisdiction cannot be met under the circumstances here, the only question is whether the second prong is applicable. *Id.* at 380.

Kokkonen held that an action to enforce a settlement agreement is within the second prong of ancillary jurisdiction if the district court's dismissal order includes a "separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporat[es] the terms of the settlement agreement in the order." *Id.* at 381. In either situation, the suit on the alleged breach of the settlement agreement effectively becomes a suit based on a claimed violation of a court order, thus giving rise to ancillary jurisdiction. *Id.*

The circuit court below did not conclude that the claimed breach of the settlement agreement at issue here was in substance a violation of any court order. Indeed, the court failed to address the key issue under *Kokkonen*: whether any order of the court had been violated or required aid or vindication. Yet under *Kokkonen*, such a determination is critical to any assertion of jurisdiction under the circumstances here. *Id.* at 381-82.

The reason the court failed to find a violation of a court order is clear: no court order was at stake in the proceedings below. Re/Max never suggested that any party had violated any court order in its motion to enforce, only that there was a breach of an agreement to agree to write a more formal settlement agreement.

The lower court failed to follow *Kokkonen* or even consider the critical question of ancillary jurisdiction, focusing instead on whether *Kokkonen* required what it called a "magic form of words" – specific language to

retain jurisdiction – or if unexpressed intent was sufficient to retain jurisdiction. Following *Kokkonen*, however, does not require using a magic form of words or searching for unexpressed intent but only the application of the fundamental principles of ancillary jurisdiction which were ignored by the court below. *See Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995) (following *Kokkonen*); *In Re: Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 275 (3d Cir. 1999) (following *Kokkonen*); *see, e.g., Schaefer Fan Co. v. J&D Mfg.*, 265 F.3d 1282, 1287 (Fed. Cir. 2001) (noting that "a district court need not use explicit language or 'any magic form of words' to effect a valid incorporation of an agreement into an order") (citations omitted).

Finally, whatever the meaning of the last sentence in the dismissal order of July 14th – the predicate for the lower court's determination – and regardless of whether the district court had authority to add that provision to the order, one point is clear: as the circuit court below admitted, that sentence does not state that the settlement agreement was incorporated into the dismissal order or that jurisdiction was specifically reserved to enforce the settlement agreement. Thus, the court did not and could not conclude that the alleged breach of the agreement to write more formal settlement papers constituted a breach of any court order. The circuit court's decision, holding that the district court properly exercised jurisdiction over the motion to enforce, is thus directly contrary to *Kokkonen*.

II. The Decision Below Is In Direct Conflict With The Decision Of Every Other Post-*Kokkonen* Federal Circuit Court.

Every circuit court which has considered the issue presented here has held that a district court only has jurisdiction over a post dismissal motion to enforce a settlement agreement if that action comes within the court's ancillary jurisdiction as delimited by *Kokkonen*. The decision of the Second Circuit in *Scelsa* is typical of these decisions. *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37 (2d Cir. 1996).

In *Scelsa*, the parties entered into a settlement agreement. The order dismissing the case noted that the "action is dismissed with prejudice and without costs to any party, except as set forth in the settlement agreement." *Id.* at 39-40. Following *Kokkonen*, the Second Circuit held that neither the reference to the settlement agreement nor the ambiguous phrase in the dismissal order stating "except as set forth in the settlement agreement" were sufficient for the court to retain jurisdiction to hear the motion to enforce the settlement agreement. *Id.* at 41. As the Second Circuit explained, "most importantly, the dismissal order neither expressly retains jurisdiction over the agreement nor incorporates its terms." *Id.*

Similarly, every other circuit which has considered the fundamental jurisdictional issue presented here has held that the proponent of jurisdiction must demonstrate that the district court has jurisdiction under the principles of ancillary jurisdiction as defined in *Kokkonen*. *In Re: Phar-Mor, Inc. Sec. Litig.*, 172 F.3d at 275; *Nat'l Presto*

Indus. v. Dazey Corp., 107 F.3d 1576, 1583 (Fed. Cir. 1997); *Miener v. Missouri Dep't of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995); *Lucille v. City of Chicago*, 31 F.3d 546, 548-49 (7th Cir. 1994); *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995).

The decision in this case is in direct conflict with each of the cited circuit court decisions. Indeed, the court below recognized that its decision was in conflict with those in other circuits. *Re/Max Int'l*, 271 F.3d at 644. After discussing the decision of the Second Circuit in *Scelsa*, described above, and that of the Ninth Circuit in *Hagestad*, cited above, the court stated "[n]eedless to say, these decisions are not binding on our Circuit." *Id.* The court below thus acknowledged that its decision created a split in the circuits.

III. The Opinion Below Is In Direct Conflict With Earlier Decisions Of The Sixth Circuit.

As Judge Wallace notes in his dissent, and as the court below virtually admits, the decision is this case is in direct conflict with two recent decisions of the Sixth Circuit. *Re/Max*, 271 F.3d at 651 (Wallace, J., dissenting); *see McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000); *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000).

McAlpin is representative of the reasoning and holdings of these two decisions. In that case, the district court did not expressly reserve jurisdiction to enforce the settlement agreement or incorporate the settlement agreement in the dismissal order. *McAlpin*, 229 F.2d at 502.

After citing *Scelsa*, the *McAlpin* court held that the district court did not have jurisdiction to enforce the settlement agreement:

> [b]ecause this court has joined other circuits in strictly applying *Kokkonen*'s relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation, the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement.

Id.; *accord Caudill*, 200 F.3d at 917.

In this case the lower court dismissed *McAlpin* and *Caudill* as "dicta" and later suggested that *McAlpin* was wrongly decided. *Re/Max Int'l*, 271 F.3d at 643. The court's claim that those decisions are dicta is based on the theory that there is a distinction between the "incorporation" exception of *Kokkonen* on which those opinions are based and the "reservation of jurisdiction" exception at issue here. *Id.* No explanation was offered for the claimed distinction. *Id.* at 651 (Wallace, J., dissenting).

The court went on to suggest that *McAlpin* had misconstrued *Kokkonen* and, citing *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) for the proposition that "federal courts have inherent powers to enforce agreements executed in settlement," concluded that "this Court has not historically adopted such a narrow construction of a district court's jurisdiction." *Id.* at 645. Since *Aro Corp.'s* "inherent powers" theory of jurisdiction

was rejected by *Kokkonen*, *McAlpin*, and *Caudill*, the decision in this case is not only contrary to *Kokkonen* but also those decisions from the Sixth Circuit.

IV. The Decision Below Is Erroneous.

The decision below is erroneous. It disregarded long established principles of, and limitations on, federal jurisdiction and impermissibly extends the jurisdiction of the district courts by judicial decision.

The principles on which *Kokkonen* is based are not novel. The concept that federal courts are courts of limited jurisdiction for which matters are to be presumed outside their authority, and that the proponent of federal jurisdiction must establish that a matter is within the court's jurisdiction is a long established principle of, and limitation on, the jurisdiction of the federal courts. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Turner v. President, Directors and Co. of the Bank of N. Am.*, 4 U.S. (4 Dallas) 8, 11 (1799). Equally well established is the doctrine of ancillary jurisdiction under which federal courts can hear matters sufficiently related to a pending claim as well as those necessary for the district court to vindicate its orders and judgments. *See United Mine Workers of Am. v. Gibb*, 383 U.S. 715, 725 (1966); *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926); *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1868); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

Prior to *Kokkonen*, there was a split among the lower courts concerning the jurisdiction of the district court to hear a post dismissal with prejudice motion to enforce a

settlement agreement. Some courts held that the district court had the "inherent authority" to hear such a motion when the agreement arose from a case settled in that court. *Wilkinson v. FBI*, 922 F.2d 555, 557 (9th Cir. 1991) (opinion joined by Judge Wallace who dissented in this case); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (finding that the trial court has "inherent power"); *Dankese v. Defense Logistics Agency*, 693 F.2d 13, 16 (1st Cir. 1982) (stating that the "trial court retains an inherent power"). Other courts rejected the "inherent power" theory, requiring the showing subsequently mandated by *Kokkonen*. *Langley v. Jackson State Univ.*, 14 F.3d 1070, 1074 (5th Cir. 1994) (holding that after dismissal with prejudice and absent incorporation of the agreement or a specific reservation of jurisdiction, an independent jurisdictional base is required); *Fairfax Countywide Citizens Ass'n v. County of Fairfax*, 571 F.2d 1299, 1304 (4th Cir. 1978) (holding that "the inherent power of a district court to enforce settlement agreements, like any other power . . . presupposes the existence of federal jurisdiction over the case or controversy"). This Court resolved that split in *Kokkonen*, delimiting the district court's jurisdiction in such instances to the power necessary to protect its judgments based on the doctrine of ancillary jurisdiction and rejected the theory of "inherent power."

The circuit court here ignored these fundamental principles. First, the decision of the circuit court below begins from the wrong premise, failing to even mention the fact that federal courts are courts of limited jurisdiction and that a proponent of that jurisdiction must demonstrate that a claim falls within it. *See Re/Max Int'l*, 271 F.3d at 651 (Wallace, J., dissenting).

Second, the circuit court ignored the principles and limitations of ancillary jurisdiction on which *Kokkonen* is based. Rather than discussing those principles, or the inherent limitations of federal jurisdiction, the circuit court dismissed its own precedent, which faithfully followed *Kokkonen*, as too narrow and misguided:

> we do not believe that *Kokkonen* requires the interpretation mentioned in *McAlpin*. While *McAlpin* purports to quote the words of Justice Scalia, the phrase "expressly retained jurisdiction" does not appear in the Supreme Court's decision in *Kokkonen*.

Id. at 643. This claim is the predicate to the conclusion that a "magic form of words" is not required – a supposition which ignores the holding of *Kokkonen*. As this Court stated in *Kokkonen*:

> [b]ut the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made a part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by a provision incorporating the terms of the settlement agreement in the order.

Kokkonen, 511 U.S. at 380-81 (quoted in *McAlpin*, 229 F.3d at 501). Indeed, *McAlpin* correctly recognized that *Kokkonen* and principles of ancillary jurisdiction require that the dismissal order contain plain, unambiguous words reserving jurisdiction or incorporating the settlement agreement so the motion to enforce can be fairly viewed

as one on the judgment or order. *McAlpin*, 229 F.3d at 503. The jurisdiction of the district courts should not hinge on vague words, unexpressed intent or incorrect theories of "inherent authority." *Kokkonen*, 511 U.S. at 381-382.

Third, the circuit court below relied on decisions which are inapposite and/or no longer valid. For example, the court cited *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994) and *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997) for the proposition that a district court has the authority to hear a post dismissal motion to enforce if the dismissal order gives the party the right to reopen the judgment. *Re/Max Int'l*, 271 F.3d at 643-44. Yet the dismissal orders in each of those cases were without prejudice and reserved the right to hear the type of motion later brought before the court. *Bell*, 36 F.3d at 448; *Ford*, 119 F.3d at 562. Similarly, the court's apparent reliance on *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), despite its admission that the "circular logic" in *McCall-Bey* "may not survive *Kokkonen*" is clearly misplaced. *Re/Max Int'l*, 271 F.3d at 643. The circuit which decided *McCall-Bey* stated that in view of *Kokkonen* the *McCall-Bey* decision is of questionable validity. *In Re: Bond*, 254 F.3d 669, 676, n.4 (7th Cir. 2001).

Finally, the court's effort to distinguish *Kokkonen*, *McAlpin* and *Caudill* is based on a misconstruction of the record and only serves to highlight the erroneous nature of the ruling below. The circuit court's claim that *Kokkonen* and its progeny are distinguishable because each of those cases was dismissed under Federal Civil Rule 41(a)(1) (dismissal on stipulation of the parties) rather than Rule 41(a)(2) (dismissal on motion of plaintiff and such terms as the court deems appropriate), which it

claims was the basis for the dismissal of this case, is simply incorrect. *Re/Max Int'l*, 271 F.3d at 644 (footnote omitted). Not only did the court fail to explain the reason this distinction is important – and it is not – but neither the transcript from July 13th nor the July 14th dismissal order cite any provision of the Federal Rules. There is no motion in the record by the plaintiffs as required by Rule 41(a)(2). Indeed, Re/Max acknowledged in its brief to the circuit court that it had not filed such a motion or requested a Rule 41(a)(2) dismissal. App., *infra*, at 79a.

Rather, the dismissal order could only have been entered under Rule 41(a)(1) which provides for dismissal on stipulation of the parties. That stipulation is in the settlement agreement of the parties in the transcript of July 13th and states that the case is to be dismissed with prejudice. App., *infra*, at 70a. Indeed, the July 14th dismissal order cites the July 13th settlement agreement as its predicate. App., *infra*, at 67a.

Finally, neither the July 13th Settlement of the parties in this case, as reflected in the transcript, nor Rule 41(a)(1) provide that the court can condition the dismissal on a retention of jurisdiction. *Cf. Kokkonen*, 511 U.S. at 381-82 (noting that Rule 41(a)(1) does not provide that the court can add conditions to the dismissal). Thus, whatever the meaning of the last sentence in the dismissal order of July 14th, it is clear that it does not transform a claim concerning an alleged breach of an agreement to agree on more formal settlement papers into an action based on a court order – the predicate under *Kokkonen* for ancillary jurisdiction here. An ambiguous sentence in a dismissal order added without the authority of the parties or the Civil Rules is clearly not a basis for the

expansion of federal jurisdiction. The decision of the circuit court is erroneous.

V. The Question Presented Is Important.

The question presented is important, extending far beyond this case and poses three key points, each of which is significant. First, central to the resolution of this case is the constitutional limitations on the jurisdiction of the federal courts. Under the Constitution, federal courts have limited jurisdiction with all other matters being left to the state courts. U.S. CONST. art. III, § 2 cl. 1; U.S. CONST. Amend. X; *see also Alden v. Maine*, 527 U.S. 706, 739 (1999) (noting that the "Federal Government . . . 'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' ") (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816)); The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961) (holding that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"). The question presented here is whether the court below can in fact extend the judicial power of the federal courts beyond the limits set by the Constitution and Congress to adjudicate matters it deems appropriate, such as the issue of state contract law presented below. The resolution of this issue has import and implications far beyond this case.

Second, the question presented involves the authoritative nature of this Court's decisions and whether the

lower federal courts must adhere to them. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[w]e reaffirm that '[i]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions' ") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). The lower court's opinion establishes a precedent which is directly contrary to this Court's holding in *Kokkonen*, as well as the long established principles of and limits on federal jurisdiction set forth in the Constitution and decisions of this Court which presaged *Kokkonen*. By ignoring this Court's decision in *Kokkonen*, and the decisions and principles on which it is based, the court below eroded the authority of this Court and seriously undermined important constitutional and jurisdictional principles. The resolution of this question is thus important to the administration of the federal courts.

Third, absent review by this Court the lower circuit courts will again be split on an important question of federal jurisdiction. Prior to *Kokkonen* there was a division among the lower courts over the limitations of federal judicial power to resolve a motion to enforce a settlement agreement emanating from a dismissed federal law suit. As noted earlier, some courts suggested that they had the "inherent authority" to hear such matters while others held that the district court's jurisdiction was limited in a fashion not inconsistent with the principles in *Kokkonen*. Absent a resolution of this case by this Court, the decision below returns the federal courts to the sharp division over the proper demarcation of federal and state judicial power which previously existed.

The significance of the potential split among the courts on this critical jurisdictional issue is illustrated by the opinions below. Here the district court extended its jurisdiction so it could act as a settlement contract drafter, selecting and cobbling together provisions, definitions and terms to form a new agreement it deemed appropriate from incomplete drafts tendered by disputing parties. Whatever the proper role of the federal courts, one point is clear: the district court is not a drafter of settlement contracts. Indeed, if the district court had the authority to impose settlement agreements it deems appropriate – and it does not – parties would be reluctant to engage in settlement discussions with the court for fear that the court would do what was done here: impose a new and different agreement by judicial fiat. That eventuality would undermine the salutary role of those courts in the settlement process which is critical to managing overloaded dockets. Thus, left unreviewed, the decision below may discourage settlement and will serve as precedent for other courts to author further extensions of their jurisdiction in contravention of established constitutional principles and the decisions of this Court.

In sum, this case provides this Court with a rare opportunity to review and resolve three important matters at once: (1) federal jurisdiction and its limits; (2) the authority of this Court's pronouncements and their impact on the lower courts; and (3) the opportunity to resolve a split among the lower federal courts and thereby avoid the incursion of those courts into areas

reserved for the state courts. The question presented here is thus of importance extending far beyond this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2002

RE/MAX INTERNATIONAL, INC., et al., Plaintiffs-Appellees, RE/MAX NORTHEAST OHIO LIMITED PARTNERSHIP, et al., Intervenors-Appellees, v. REALTY ONE, INC., Defendant-Appellant, SMYTHE, CRAMER COMPANY, Defendant.

No. 00-4235

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

271 F.3d 633; 2001 U.S. App. LEXIS 24190; 2001 FED App. 0397P (6th Cir.); 2001-2 Trade Cas. (CCH) P73,481

July 31, 2001, Argued

November 9, 2001, Decided

November 9, 2001, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 94-00062. James S. Gwin, District Judge.

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1999 U.S. App. LEXIS 6090 (6th Cir. Ohio 1999)

DISPOSITION:

Affirmed.

COUNSEL:

ARGUED: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., for Appellees.

ON BRIEF: Thomas O. Gorman, PORTER, WRIGHT, MORRIS & ARTHUR, Washington, D.C., Hugh E. McKay,

Gina L. Schaecher, PORTER, WRIGHT, MORRIS & ARTHUR, Cleveland, Ohio, for Appellant.

Daniel H. Bromberg, JONES, DAY, REAVIS & POGUE, Washington, D.C., Mark J. Andreini, Stephen J. Squeri, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, Edward W. Cochran, COCHRAN & COCHRAN, Shaker Heights, Ohio, Terrence R. Quinn, Day & Barker, Rapid City, South Dakota, for Appellees.

JUDGES:
Before: CLAY, GILMAN and WALLACE, Circuit Judges.*
CLAY, J., delivered the opinion of the court, in which GILMAN, J., joined. WALLACE, J., delivered a separate dissenting opinion.

OPINION BY:
CLAY

OPINION:

CLAY, Circuit Judge. Defendant, Realty One, Inc. ("Realty One"), appeals the district court's summary enforcement of a settlement agreement in this antitrust action instituted by rival northeast Ohio real estate brokerage firm RE/MAX International, Inc ("RE/MAX"). After the parties reached a settlement agreement, the district court dismissed the case with prejudice without incorporating the terms of the agreement into its order or explicitly stating that it was retaining jurisdiction to enforce those terms. On appeal, Realty One challenges the district court's jurisdiction to enforce the settlement

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* The Honorable J. Clifford Wallace, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

agreement. Realty One also contends that even assuming the district court had jurisdiction to enforce the settlement agreement, it abused its discretion by not limiting its order to the terms in the transcript of the settlement proceedings. For the reasons that follow, we **AFFIRM** the district court's judgment.

BACKGROUND

A. Initial Proceedings

RE/MAX is a franchisor of a real-estate brokerage system which it sells to franchisees across the nation, including northeast Ohio. Intervenor RE/MAX Northeast Ohio Limited Partnership is the RE/MAX subfranchisor for the northeast Ohio region, which consists of Cleveland and the surrounding area. Defendants Realty One and Smythe, Cramer Company ("Smythe, Cramer") are the largest real estate brokerage companies in northeast Ohio in terms of market share. RE/MAX filed suit against Realty One and Smythe, Cramer in the United States District Court for the Northern District of Ohio, alleging that their practice of paying brokers associated with RE/MAX's franchisees lower commissions on split commission transactions violated the Sherman Antitrust Act and analogous state laws. This practice was known as an "adverse split" and was allegedly designed to drive RE/MAX out of business in northern Ohio by deterring its agents from doing business there.[1] The case was initially

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[1] The standard practice in the real-estate industry is that commissions are split equally when one broker brings the seller and another broker brings the buyer to a transaction. However,

assigned to District Judge David Dowd, who granted Defendants' motions for summary judgment as to some of RE/MAX's claims. *See RE/MAX Int'l Inc. v. Realty One, Inc.*, 924 F. Supp. 1474 (N.D. Ohio 1996). RE/MAX appealed and Realty One cross-appealed. We reversed in part and remanded for further proceedings. *See RE/MAX Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999).

The case proceeded to trial on April 10, 2000. Judge Dowd bifurcated the trial. After the presentation of the evidence, Judge Dowd instructed the jury to first decide whether Defendants had entered an agreement to issue adverse splits, which was an essential element of RE/MAX's federal antitrust claim. Following deliberations, the jury returned a verdict finding that Realty One and Smythe, Cramer had illegally agreed to restrain trade. Judge Dowd then instructed the jury to consider additional elements of RE/MAX's claims. During deliberations on these issues, the jurors posed a question that suggested they had misunderstood Judge Dowd's instructions regarding their earlier deliberations. Finding that the earlier misunderstanding could not be corrected, Judge Dowd declared a mistrial on June 26, 2000. On that same day, the case was transferred to District Judge James Gwin's docket and a new trial was scheduled for August 7, 2000. Settlement negotiations commenced shortly thereafter.

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beginning in 1987, Realty One and Smythe, Cramer began notifying RE/MAX brokerages that there would be an adverse split of 70/30 or 75/25, in favor of the defendants, whenever a RE/MAX agent was on the other side of the table from a Realty One or Smythe, Cramer agent.

B. Settlement Negotiations

On June 29, 2000, Judge Gwin appointed Judge Dowd to mediate settlement discussions with the parties. After Judge Dowd's efforts to mediate the dispute proved unsuccessful, Judge Gwin conducted mediation sessions with the parties on July 11, 12, and 13, 2000. The settlement discussions focused on two areas – a multi-million dollar monetary settlement and limitations regarding future commission-splitting and related matters. After many hours of negotiations, the parties significantly narrowed their gap with regard to a monetary settlement. The parties then shifted their focus to the issues associated with their future commission-splitting relationship. On July 13, 2000, RE/MAX and Smythe, Cramer reached a comprehensive settlement agreement. Judge Gwin asked RE/MAX and Smythe, Cramer to state the general terms of their agreement on the record. The parties did so, and stated their understanding, confirmed by the court on the record, that they would complete a written settlement agreement within forty-five days.

At the time the RE/MAX-Smythe, Cramer settlement was reached, Realty One had refused to settle with RE/MAX and indicated that it was prepared to go to trial.[2]

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[2] The district court noted its belief as to why Realty One failed to settle earlier:

> Within itself, Defendant Realty One appeared to have different interests. These different interests impaired Realty One's willingness to settle.
>
> After summary judgment had been given but before the Sixth Circuit had reversed Judge Dowd's grant of summary judgment, the former owners of

In particular, Realty One would not agree to the same limitations upon future conduct to which Smythe, Cramer had agreed. However, as RE/MAX and Smythe, Cramer

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Realty One sold their interest in Realty One to Insignia Financial Group, Inc. As part of their sales agreement for Realty One, the former owners agreed to indemnify Realty One for expenses and any judgment associated with this case. After the Sixth Circuit reversed the grant of summary judgment, these former owners became contractually obligated to defend and indemnify Realty One for expenses and any judgment in this case. Because of this contractual obligation, these former owners have already indemnified many millions of dollars of expenses and fees including expenses and fees generated in the first trial that had lasted more than ten weeks.

In seeking to settle Plaintiff RE/MAX's claims against Defendant Realty One, the former owners were able to reach an agreement in principal [sic] for financial payments sufficient to satisfy Plaintiff RE/MAX. As to such financial payments on behalf [sic] Realty One, Insignia Financial Group, Inc. refused to make any contribution. Insignia Financial Group refused contribution even though some argument existed that the former owners' duty to indemnify and defend only extended to claims arising during their tenure, not to claims or damages arising during Insignia's ownership.

Although the former owners of Defendant Realty One offered sufficient monies to settle Plaintiff RE/MAX's claim, the current management of Realty One refused to agree to the same limitations on conduct agreed to by Defendant Smythe Cramer. Of course, Smythe Cramer was paying its own expenses and would be risking its own assets if it proceeded to trial. In contrast, the current owner of Realty One, Insignia Financial Group, Inc. seemed willing to spend the

confirmed their agreement on the record, Realty One's counsel unexpectedly stated that he desired a settlement on the same terms as Smythe, Cramer, except that Realty One would pay nearly twice as much in the settlement.[3]

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former owner's monies on expenses and risk the former owner's assets to respond to any potential judgment.

(J.A. at 199 n.3.)

[3] As the proceedings continued, Realty One's Counsel, Thomas Gorman, suddenly decided to settle the matter:

> THE COURT: I look at my calendar, as against Realty One we are going to start it [the jury trial] on [August 7, 2000].
>
> MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangement we discussed earlier. I don't know the number.
>
> MR. QUINN: So you are agreeing now to settle?
>
> MR. GORMAN: Yes.
>
> MR. QUINN: Same terms?
>
> MR. GORMAN: Same terms.
>
> MR. QUINN: 10 million – No, that's the total. $6,666,666.
>
> MR. GORMAN: $6,666,666 is for Realty One.
>
> THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $ 6,666,666.
>
> MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier, the two Avenis, Joe Aveni and Vince Aveni and Jim Miller [the former owners] on behalf of Realty One. And we adopt the same terms and *will draft the papers in the same time period.*

(J.A. at 1758-59 (emphasis added).) The district court noted that "with its change of face and speedy retreat

The next day, the district court entered an order dismissing the action with prejudice pursuant to Federal Rule of Civil Procedure Rule 41(a)(2).

C. Post-Settlement Activities

In the days that followed, Realty One issued a press release indicating that the "final details of the settlement . . . [were] being conducted by attorneys for the various parties." (J.A. at 1025.) Realty One also circulated a newsletter to its employees which stated "[Realty One has] reached an agreement, in principle, to settle our long-running lawsuit with RE/MAX. Though the details are still being finalized, the definitive agreement is expected by the end of August." (J.A. at 1025.) Over the course of the next month and a half, the parties engaged in continued talks, but failed to prepare a draft of the final agreement.

First, RE/MAX sent a draft of a written agreement to Realty One on July 25, 2000. Realty One did not respond to RE/MAX's draft for over three weeks. On August 17, 2000, Realty One informed RE/MAX that it was "not necessary to prepare any additional documentation concerning the settlement" because "the transcript dictated by Judge Gwin and agreed to by counsel and the parties in court on July 13, 2000, is the complete settlement of the parties." (J.A. at 1810). Realty One also claimed that

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from its professed willingness to allow a jury to decide its liability, Defendant Realty One agreed to pay much more than the amount agreed upon by Defendant Smythe Cramer." (J.A. at 199-200.)

RE/MAX's proposed draft contained "additional terms and provisions" not included in the July 13, 2000 settlement. Yet, Realty One failed to identify the allegedly different terms despite repeated requests to do so.

On August 24, Realty One's counsel sent a letter to RE/MAX's counsel which stated,

> The July 13 agreement does not require any additional written agreement (except the . . . [written] releases). However, as I indicated in our [August 17th] conversation, if plaintiffs believe that it may be useful to incorporate the terms of the agreement as dictated by Judge Gwin in a separate document we are willing to discuss preparing such a document.

(J.A. at 1812.)

RE/MAX responded the next day by again asking Realty One to identify the specific terms it found objectionable by providing a "black-lined" verison of the agreement, which Realty One failed to do. Instead, on August 28, the deadline for preparing a written agreement imposed by the district court, Realty One's counsel again wrote RE/MAX's counsel to reiterate his view of the terms of the settlement agreement:

> There is no need for any additional agreements as I have repeatedly stated to you. Your view that the July 13 agreement requires that the parties write an additional settlement agreement is not supported by the transcript. In dictating the terms of the agreement the court did not specifically state that the parties would negotiate and execute an additional agreement. Rather, the references to the preparation of papers, and the forty five day designation for doing so, refers to

> the preparation of the letters to withdraw the *special notices* and the releases plaintiffs are to furnish defendants."

(J.A. at 1816 (emphasis added).) Realty One further indicated that it was willing to execute a memorial agreement "which contains the terms of the July 13th agreement (an act which is clearly unnecessary in our view)," but was unwilling to execute a document that significantly varied from that agreement. (J.A. at 1816.) However, Realty One did not prepare or forward any draft at that time. That same day, Realty One tendered a payment in the amount of $ 3,666,666 to RE/MAX; however, RE/MAX did not accept the payment. In addition, Realty One sent a letter to existing RE/MAX franchisees withdrawing "any and all *special notices*" previously issued by Realty One. (J.A. at 1819 (emphasis added).) RE/MAX's counsel expressed his frustration with Realty One in a letter later the same day:

> We continue to have a huge disagreement in what the Court contemplated by the dictated terms of the July 13th transcript.
>
> . . . Frankly, in thirty years of practice I have never settled a case where there was not some type of a settlement agreement reached. I have always dictated the rough settlement into the record so that there is no misunderstanding as to the terms of the settlement agreement, but I've always understood those terms would have to be reduced to writing so that there is no misunderstanding in the future and so that the parties can avoid the potential for future litigation.

> Also, you indicate that you want us to furnish you with the appropriate releases. Once again, I remind you that the releases were contained in the proposed settlement agreement that was sent to you over a month ago. To date, we have never heard one word indicating what is objectionable within that agreement other than the fact that Realty One continues to indicate that the agreement contains terms which are not in the July 13th agreement. Specifically, I continue to ask you to tell us what terms you are referring to.
>
> Finally, you ask whether or not we still wanted you to "red-line" the agreement to eliminate the terms which have been "added" to the July 13th agreement. Yes, we have been asking Realty One to do this for a month. It was not until last week that I learned that Realty One was insistent on not signing a formal settlement agreement.
>
> . . .
>
> We have no alternative but to request a conference with Judge Gwin.

(J.A. at 1822.)

RE/MAX requested a status conference once it became clear that the district court's deadline for drafting a final agreement would not be met. In response, Realty One identified some of the terms it considered to be unwarranted or outside the contemplation of the parties. Two of Realty One's specific concerns were security promises the RE/MAX draft imposed on Realty One's parent entity and former owners as well as the requirement of quarterly payments with compounded interest.

Significantly, neither of these provision was included in the district court's order which is the subject of the instant appeal. On Friday, September 1, 2000, Judge Gwin conducted an off-the-record conference call with the parties during which he instructed them to continue negotiating over the Labor Day weekend. He further instructed that a motion to enforce should be filed by 4:00 p.m. on the Tuesday after Labor Day if the parties had not reached an agreement by that time. Later on the same day, RE/MAX sent a letter to Realty One accommodating some of its stated objections and asking whether Realty One had additional objections. That evening, Realty One informed RE/MAX that it had "difficulties" with that draft, but failed to specify those problems.

On the evening of Monday, September 4, 2000, Realty One sent RE/MAX a list of nearly two dozen of its concerns. Realty One also proposed its own draft of the agreement, which had a cover letter attached reading, in part, "We have prepared a draft agreement in accordance with the July 13, 2000 transcript since the provisions in your earlier draft far exceeded the terms agreed to." (J.A. at 1063.) RE/MAX objected to this draft, arguing that it narrowed the meaning of key terms. Ironically, Realty One's proposed agreement, while purporting to be limited to the terms of the July 13th transcript as RE/MAX's agreement had allegedly failed to do, was actually longer than RE/MAX's draft.

On September 5, 2000, RE/MAX filed a motion to enforce the settlement agreement. Realty One opposed this motion on the basis that the district court lacked jurisdiction. Realty One also alleged that it had already satisfied the terms of the July 13th agreement. Neither

party requested an evidentiary hearing. Judge Gwin entered an order enforcing the motion on September 14, 2000.

DISCUSSION

I. JURISDICTION TO ENFORCE SETTLEMENT AGREEMENT

This court reviews a district court's decision regarding subject matter jurisdiction *de novo*. *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000). The party seeking to invoke the subject matter jurisdiction of the district court bears the burden of showing that the matter is properly before that court. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)).

Realty One contends on appeal that the district court lacked subject matter jurisdiction to enforce the settlement agreement because the language of its order of dismissal was unconditional We disagree. The order of dismissal in the case at bar read, in full:

> Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this[.] Therefore,
>
> IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice".
>
> FURTHER, Any subsequent order setting forth different terms and conditions relative to the

> settlement and dismissal of the within action shall supersede the within order.

(Order of Dismissal, J.A. at 693.)

In *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), the Supreme Court considered a district court's attempt to enforce a settlement agreement between parties in a diversity action. The parties had settled and filed a stipulation of dismissal with prejudice pursuant to Fed. R. Civ. Pro. 41(a)(1)(ii), which the district court judge then signed.[4] Writing for a unanimous Court, Justice Scalia explained that as courts of limited jurisdiction, federal district courts do not possess the inherent power to vindicate their own authority where parties enter into a voluntary agreement resolving their federal lawsuit. 511 U.S. at 376-77. Instead, "enforcement of the settlement agreement, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own

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[4] That rule provides:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a)(1)(ii).

basis for jurisdiction." 511 U.S. at 378. However, a district court does have the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement. *Futernick v. Sumpter Township*, 207 F.3d 305, 310 (6th Cir. 2000). The *Kokkonen* Court noted that such ancillary jurisdiction would have existed if the parties had provided for the court's enforcement of a dismissal-producing settlement agreement through either one of two methods:

> The only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (*such as a provision "retaining jurisdiction"* over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a breach of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Kokkonen, 511 U.S. at 381 (emphasis added).

We first considered the requirements for satisfying the second *Kokkonen* exception in *Caudill v. N. Am. Media Corp.*, 200 F.3d 914 (6th Cir. 2000).[5] Following the

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[5] In *Caudill*, we were presented with a dismissal order which stated:

> In the presence of and with the assistance of counsel, the parties placed a settlement agreement on the record before the Hon. Bernard Friedman on October

decisions of the Third and Eighth Circuits on this issue in *In re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270 (3d Cir. 1999), and *Miener v. Missouri Department of Mental Health*, 62 F.3d 1126 (8th Cir. 1995), we held that "the phrase 'pursuant to the terms of the settlement' fails to incorporate the terms of the settlement agreement into the order because '[a] dismissal order's mere reference to the fact of settlement does not incorporate the settlement agreement in the dismissal order.' " *Caudill*, 200 F.3d at 917 (citations omitted). In *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000), we similarly held that the mere reference in a dismissal order to a settlement agreement does not incorporate the settlement agreement into the order.[6]

1, 1991. Pursuant to the terms of the parties' October 1, 1991 settlement agreement, the Court hereby DISMISSES this case.

IT IS SO ORDERED.

Caudill v. N. Am. Media Corp., 200 F.3d 914, 915 n.1 (6th Cir. 2000).

[6] In *McAlpin*, the stipulation of dismissal provided,

> The parties being in agreement and the Court being otherwise sufficiently advised that the parties hereto have settled their disputes,. . . . the Court hereby orders:
>
> 1. That the Complaint filed herein is DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS asserted therein and this action is Ordered stricken from the docket of this Court in its entirety.
>
> 2. That this Court's Order of August 29, 1997, is hereby amended to provide that Count II of the Complaint is Dismissed with Prejudice.

Inasmuch as the district court's order of dismissal in the instant case merely made reference to "settlement talks" and failed to incorporate the terms of the settlement agreement, it is clear that the second *Kokkonen* exception has not been satisfied. However, in considering RE/MAX's motion to enforce, the district court found that through the language of its order, it had retained jurisdiction to enforce matters concerning the settlement agreement in satisfaction of the first *Kokkonen* exception.

Realty One argues that under this Court's opinion in *McAlpin*, the district court's language was not sufficiently explicit. Realty One points to this Court's statement in *McAlpin* that under *Kokkonen* "a federal district court lacks jurisdiction to enforce a settlement agreement terminating litigation unless the court ***'expressly retained jurisdiction*** to enforce the settlement agreement' or 'incorporated the terms of the settlement into the dismissal order.' " *McAlpin*, 229 F.3d at 501 (emphasis added). In *McAlpin*, we noted that this Court has "joined other circuits in strictly applying *Kokkonen's* relatively narrow interpretation of a district court's ancillary jurisdiction to enforce settlement agreements terminating litigation." *Id.* at 502. However, we did not have occasion to construe the first *Kokkonen* exception in that case.

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3. That the Court appointed Receiver, Morris Gahafer, is hereby ordered to turn over to the Defendants any and all copies of the Receiver's First Interim Report as well as any drafts thereof or any other documents which he may have obtained or generated as a result of the performance of his duties as Receiver herein.

McAlpin v. Lexington 76 Auto Truck Stop, Inc., 229 F.3d 491, 497 (6th Cir. 2000).

Instead, the holding in *McAlpin* was limited to holding that "the district court's incorporation in its dismissal order of only a single term of the parties' 20-page settlement agreement is insufficient to support the court's exercise of ancillary jurisdiction over the entire agreement." *Id.* Insofar as the first *Kokkonen* exception was not the basis for our decision in *McAlpin*, the language to which Realty One points is dicta and therefore not binding on this Court.[7]

Moreover, we do not believe that *Kokkonen* requires the interpretation mentioned in *McAlpin*. While *McAlpin* purports to quote the words of Justice Scalia, the phrase "expressly retained jurisdiction" does not appear in the Supreme Court's decision in *Kokkonen*. Instead, *Kokkonen* only requires a reasonable indication that the court has retained jurisdiction, "*such as* a provision 'retaining jurisdiction' over the settlement agreement." *Kokkonen*, 511 U.S. at 381 (emphasis added). In this way, the Court intended to avoid subjective interpretations of what a district court intended to accomplish through its order of dismissal – a practice employed by appellate courts in cases such as *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985).[8] However, while the circular logic used in *McCall-*

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[7] The same may be said of our decision in *Caudill*, which was decided a few months earlier. *See Caudill*, 200 F.3d at 915; *see also In re Phar-Mor, Inc. Secs. Litig.*, 172 F.3d 270, 273 (3d Cir. 1999) (holding that no jurisdiction existed after an order dismissed the case with prejudice "*pursuant to the terms of the Settlement* . . . "). The dismissal orders in those cases contained no language which could be construed as retaining jurisdiction.

[8] In *McCall*, the court reasoned:

> The judge would not have been likely to grant such a petition in a case over which he had no jurisdiction

Bey may not survive *Kokkonen*, the tradition of not requiring the use of specific terminology remains. *See id.* at 1188 (rejecting the notion that "there is any magic form of words that the judge must intone in order to make the retention of jurisdiction effective.").

In post-*Kokkonen* decisions, appellate courts have adhered to this view. For example, in *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994), the Fifth Circuit held that the district court had properly retained jurisdiction by including language in its dismissal order that gave the parties the right to reopen the judgment if a settlement was not consummated within sixty days.[9] Also, in *Ford v.*

> because he had dismissed the case outright months earlier. His response is therefore some evidence that he had indeed intended to make his dismissal, though outright in form, conditional in substance; that in referring to the as yet unfiled stipulation in his order of dismissal, the judge, perhaps fully aware of the tenor and progress of the settlement negotiations and the provision in the settlement agreement for petitioning the court to enforce it, intended to honor that provision, and to this end decided to retain jurisdiction of the litigation for the very purpose of responding to the type of petition that the plaintiff filed. It would of course have been much better if the judge had made all this clearer, but we conclude that the plaintiff has shown – if barely – that the judge did retain jurisdiction of the case.

McCall-Bey v. Franzen, 777 F.2d 1178, 1188-89 (7th Cir. 1985).

[9] The *Bell* court explained,

> The order states that the court, "having been advised by counsel for the parties that the above action has been settled," was dismissing the case "without prejudice to the right, upon good cause shown within

Neese, 119 F.3d 560, 561-62 (7th Cir. 1997)[10], the Seventh Circuit borrowed the surviving logic of *McCall-Bey* in holding that it was apparent that the district court intended to retain jurisdiction.[11] The Seventh Circuit recently employed this logic again in *In re Bond*, 254 F.3d 669 (7th Cir. 2001).

Realty One cites post-*Kokkonen* cases from other circuits that require express language of retention. *See, e.g., Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996) (holding that under *Kokkonen*, the district court has jurisdiction only if the dismissal order expressly reserved authority to enforce the agreement, or incorporated the agreement into the order); *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995) (holding that although the court clearly intended to retain jurisdiction, an order dismissing the case with prejudice "with leave for good cause

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> sixty (60) days, to reopen it if settlement is not consummated and seek summary judgment and enforcing the compromise."

Bell v. Schexnayder, 36 F.3d 447, 448 (5th Cir. 1994).

[10] The order in *Ford* dismissed the suit "without prejudice to reinstatement in the event that the . . . payments are not made by the defendant. . . . " *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997).

[11] It cannot be said that all of the Seventh Circuit's reasoning in *McCall-Bey* is meaningless in the wake of *Kokkonen*. Indeed, the court recognized in *McCall-Bey* that "there must be a deliberate retention of jurisdiction, as by issuing an injunction or stating that jurisdiction is retained for a particular purpose. An unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by Rule 60(b)." *See McCall-Bey*, 777 F.2d at 1190.

shown within ninety (90) days, to have the dismissal set aside and the action reinstated if the settlement is not consummated" failed to meet the *Kokkonen* standard). Needless to say, these decisions are not binding on our Circuit. In addition, we believe these cases are distinguishable. As was true in *Kokkonen*, *McAlpin* and *Caudill*, many of these cases involved stipulations of dismissal prepared by the parties and ratified by the court pursuant to Fed. R. Civ. P. 41(a)(1)(ii). *See, e.g., Scelsa*, 76 F.3d at 39 (finding no jurisdiction where the district court dismissed the action with prejudice after approving an order drafted by the parties pursuant to Rule 41(a)(1)(ii), marking it "SO ORDERED."). Conversely, in the case at bar, the district court dismissed the action with prejudice in a Rule 41(a)(2) order.[12] This distinction is further evidence that *McAlpin* and *Caudill* did not settle the issue we now decide. *See Hinsdale v. Farmers Nat'l Bank & Trust*, 823 F.2d 993, 996 (6th Cir. 1987) (finding no jurisdiction where the order of dismissal with prejudice was unconditional, but

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[12] Rule 41(a)(2) provides:

> Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a)(2).

recognizing the authority of a district court to retain jurisdiction under Fed. R. Civ. P. 41(a)(2)). Furthermore, the language of the orders in many of those cases made only vague references to the settlement agreement, thereby not even implicating the first *Kokkonen* exception that we discuss today.[13]

We also note that this Court has not historically adopted such a narrow construction of a district court's jurisdiction. *See, e.g., Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (holding that federal courts have inherent powers to enforce agreements executed in settlement). The fact that we have previously found jurisdiction in light of express statements is not indicative of a change in course. *See, e.g. Futernick*, 207 F.3d at 309 (finding jurisdiction where a district court amended its judgment "to provide for the court's retention of jurisdiction until completion of the parties' obligations under the settlement agreement"); *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1145 (6th Cir. 1997) (holding that a district court had subject matter jurisdiction to address

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[13] Similar to the dismissal orders in *McAlpin* and *Caudill*, recounted earlier in this opinion, the language of the dismissal order in *Scelsa* could in no way be construed as expressing an intent to retain jurisdiction. The *Scelsa* dismissal order provided:

> It is Hereby Stipulated and Agreed, by and between the undersigned attorneys for the parties, that the above-captioned action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994.

Scelsa v. City Univ. of N.Y., 76 F.3d 37, 39-40 (2d Cir. 1996).

the state law issues because the consent decree specifically conferred jurisdiction). Simply because a mandate is exceeded is no reason to raise the bar to the same level in every circumstance.[14]

Turning to the language of Judge Gwin's order, we believe that it satisfied the second exception recognized in *Kokkonen*. The order stated that any "subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." (J.A. at 693.) Of course, the court may only enter subsequent orders involving the settlement agreement if it has retained jurisdiction. Thus, the "continued role for the court that was contemplated after dismissal" is included in the language of the order itself. *In re Bond*, 254 F.3d at 676-77. We therefore find that this was a "separate provision" retaining jurisdiction in compliance with *Kokkonen* and hold that the district court properly asserted subject matter jurisdiction.

II. TERMS OF SUMMARY ENFORCEMENT

We now address Realty One's claim that the district court erred by enforcing terms to which Realty One had not agreed. This Court reviews for clear error the district court's factual determination that the parties had agreed to settlement terms; however, we review the district

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[14] We are likewise undeterred by the fact that Judge Gwin's subsequent order of enforcement contained the sentence "This Court shall retain continuing jurisdiction to enforce the provisions of this judgment." (J.A. at 213.) After Realty One attacked the court's jurisdiction initially, it could only be expected to take every precaution in the future.

court's decision to grant a motion to enforce the settlement based on its preliminary factual finding for an abuse of discretion. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 418 (6th Cir. 2000). We will only find an abuse of discretion only when left with the "definite and firm conviction that the court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors" or where it "improperly applies the law or uses an erroneous legal standard." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000) (citations and internal quotation marks omitted).

A. Validity of Settlement Agreement

Before enforcing a settlement, a district court must conclude that agreement has been reached on all material terms. *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988). Ordinarily, an evidentiary hearing is required where facts material to an agreement are disputed. *Kukla v. Nat'l Distillers Prods. Co.*, 483 F.2d 619, 622 (6th Cir. 1973); *Aro Corp.*, 531 F.2d at 1372. However, no evidentiary hearing is required where an agreement is clear and unambiguous and no issue of fact is present. *Aro Corp.*, 531 F.2d at 1372. Thus, summary enforcement of a settlement agreement has been deemed appropriate where no substantial dispute exists regarding the entry into and terms of an agreement. *Kukla*, 483 F.2d at 621; *cf. Therma-Scan*, 217 F.3d at 419 (recognizing that summary proceedings may result in inequities when a dispute exists as to a material term). No evidentiary hearing was held in the instant case because neither party requested one. Indeed, none was required because the record shows that all the essential terms had been agreed upon in open court and

all that remained was to sort out the non-material details and put the agreement in writing. Realty One acknowledges that there was a clear and unambiguous agreement, constituting a meeting of the minds on key terms. In addition, Realty One admits that the fact that certain terms, such as "adverse split" and "RE/MAX business model," were left undefined at the July 13, 2000 court session does not undermine the crux of the agreement.

The existence of a valid agreement is not diminished by the fact that the parties have yet to memorialize the agreement. When parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement. *Brock*, 841 F.2d at 154; *Kukla*, 483 F.2d at 621 (observing that the power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of the court nor reduced to writing). Furthermore, the objective acts of the parties reflect that an agreement had been reached. In the first few days after the settlement was reached, Realty One communicated its belief that an agreement had been reached in a newsletter to its employees. In addition, at various points in the post-settlement talks, RE/MAX attempted to consummate the settlement by preparing a written document. Realty One also began performance of its obligations under the agreement by tendering a payment of over three million dollars and withdrawing its adverse split letters. Under Ohio law, these expressions of assent are generally sufficient to show a meeting of the minds. *See Nilavar v. Osborn*, 127 Ohio App. 3d 1, 711 N.E.2d 726, 733 (Ohio Ct. App. 1998).

B. Breach By Realty One

The district court noted in its order that Realty One had breached the agreement by failing to negotiate in good faith and agree to final terms. According to the plain language of the dialogue from July 13, 2000, Realty One adopted Smythe, Cramer's obligation to prepare a memorialized written expression of the settlement terms as well as to "handle the details" of the agreement within forty-five days.[15] Yet, Realty One argued that it never agreed to prepare any written document aside from papers withdrawing its special notice letters informing RE/MAX franchisees of its intent to engage in adverse splits. The record shows that Realty One stubbornly refused to cooperate.

Realty One now claims that it complied with the terms of the settlement agreement by tendering a payment for over three million dollars and by withdrawing

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[15] As RE/MAX and Smythe, Cramer had nearly completed recording the terms of their agreement, the RE/MAX's Chairman, Mr. Liniger, stated, "This becomes effective today *and we would just handle the details?*" (J.A. at 1756.) Shortly thereafter, Smythe, Cramer's Chairman, Lucius McKelvey, confirmed that documentation would be prepared to memorialize the parties agreement and RE/MAX's counsel, Terrence Quinn, agreed:

> MR. McKELVEY: Your Honor, is it implicit that the attorneys are thus mandated *to complete the written agreement within the 45 day time frame, right?*
>
> THE COURT: Yes.
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> MR. McKELVEY: That's a given.
>
> MR. QUINN: Sure, that's fine.

(J.A. at 1757-58.)

its special notice letters. However, it did not even make these overtures until August 28, 2000, which was the deadline for memorializing the agreed upon terms – not the deadline for payments or releases from the respective parties. Although both parties were jointly responsible for memorializing the terms within the prescribed time period, Realty One was more culpable because its acts that have frustrated the negotiation process, thereby necessitating judicial intervention. Thus, the district court correctly determined that Realty One breached the settlement agreement.

C. Language of the Enforcement Order

The district court determined that Realty One agreed to a settlement on the same terms as to future conduct that RE/MAX had agreed upon with Smythe, Cramer, except that Realty One agreed to pay much more than the amount agreed upon by Smythe, Cramer. As we have already discussed, this factual determination was not clearly erroneous. Realty One's attorney stated, and the district court judge verified, that Realty One was agreeing to the same deal that had been dictated into the record during the several minutes prior to Realty One's surprise settlement agreement. The district court's enforcement order prohibits Realty One from issuing "special notice letters" to RE/MAX brokers in the Northern District of Ohio based upon their affiliation with RE/MAX or their use of the RE/MAX business model. Realty One now claims that the terms in the district court's order are different than those to which it assented on July 13, 2000. Specifically, Realty One complains that certain terms are too broad and are the product of

subsequent negotiations and deals struck between RE/MAX and Smythe, Cramer. However, Realty One has failed to articulate any material differences between the July 13th agreement and the subsequent order of enforcement. We believe that the parties received the same basic deal to which they had already agreed.

"Special Notice Letter"

Realty One objects to the use of the term "special notice letter" in the district court's order, contending that it never agreed to use this term as a substitute for "adverse split." Realty One claims that use of the term "special notice letter" would significantly alter its obligations and would insulate RE/MAX from fair market competition. Although the settlement agreement as stated provides that Realty One will withdraw all adverse splits and issue them under limited circumstances in the future, the term was left undefined. However, Realty One has not demonstrated how inclusion of the term "special notice," as defined by the district court, yields a materially different agreement. Realty One informed RE/MAX of the adverse splits via special notice letters. The trade usage of the term "adverse split" comports with the district court's definition of "special notice letter."[16]

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[16] The district court's order defines "special notice letter" as

> a written notification by defendants to a broker in which a defendant (i) offers to compensate the addressee broker on the sale of a defendant listing by the addressee broker or any of its agents (either as buyer's agent or as subagent) at a level lower than

Moreover, the record of post-settlement correspondence between the parties shows that Realty One itself used these terms interchangeably. For example, the letters Realty One submitted to RE/MAX franchisees on August 28, 2000, allegedly in fulfillment of the requirement that it withdraw adverse splits against RE/MAX franchisees, announced that Realty One was "canceling any and all special notices sent . . . regarding the commission payable to your brokerage on the sale by your brokerage of a Realty One listing." (J.A. at 1819.) Realty One's challenge is therefore without merit.

"RE/MAX Business Model"

Realty One also contends that the district court's definition of the "RE/MAX business model" is too broad and expansive.[17] Realty One claims that the definition of this term should be limited to mean the RE/MAX 100% concept, a policy by which RE/MAX agents typically retained larger commissions than Realty One agents. However, Realty One provides no support for this

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> that offered generally by the defendant to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on defendant listings.

(J.A. at 206-07.)

[17] The district court order defined "RE/MAX business model" as follows:

> RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

(J.A. at 207.)

restriction. At the July settlement conference, Smythe, Cramer agreed that in addition to withdrawing all adverse splits then in effect, it would also covenant not to "impose any adverse splits *based upon the business model used by plaintiff RE/MAX or its agents*, and would do so only for reasons consistent with the imposition of adverse splits among other real estate agencies in the [North Eastern Ohio] area." (J.A. at 1756 (emphasis added).) When Realty One agreed to the same terms as Smythe, Cramer, it agreed to this provision as well. In addition, the parties' stipulations from early in the litigation imply a broader definition that Realty One now advocates.[18] We therefore find no error in the district court's definition of this term.

"North Eastern Ohio", "MLS" & "RE/MAX Brokers"

Realty One disputes the geographic area in which the agreement will be effective. Specifically, it claims that "Northeastern Ohio", or "Northeast Ohio", should be limited to the thirteen counties represented by the local real estate industry's "multiple listing services" ("MLS") – namely, the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Akron Area Multiple Listing Service ("AAMLS") – as opposed to the Northern

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[18] The first stipulation provides:

> The distinguishing characteristics of the RE/MAX system include, among other things, distinctive sales and promotional materials, centralized advertising, promotional and referral services, proprietary procedures and a 100 commission concept.

(J.A. at 316.)

District of Ohio, which includes some twenty counties. The record reveals that, on July 13th, 2000, Smythe, Cramer agreed that the restrictions would apply to "North Eastern Ohio"; the parties did not restrict this area by reference to any particular MLS. As we have explained, Realty One is also bound by this agreement. It is therefore plausible for the district court to have included the entire Northern District of Ohio, which is the area in which Realty One was allegedly engaged in anti-competitive business practices that inhibited RE/MAX's operations. The full remedy negotiated by the parties contemplated including this entire area.

In addition, Realty One's challenge to the inclusion of three listing service areas, NORMLS, AAMLS, and the Centralized Real Estate Information Service ("CIRS"), is immaterial. As RE/MAX notes, AAMLS no longer exists, and has since been replaced by CIRS. Realty One does not even begin to explain the materiality of this difference. Realty One also challenges the application of the agreement to future RE/MAX brokers, but again fails to articulate why this was in error.[19] The district court's definition

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[19] The district it [sic] court's order defines "RE/MAX Brokers" in the following manner:

> "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used

comports with the notion that Realty One adopted Smythe, Cramer's agreement to terminate its allegedly illegal business practices as to "all RE/MAX principals and agents." (J.A. at 1755.) The record contains no restriction applying only to current RE/MAX agents. Furthermore, the settlement talks focused in large part upon prospective business arrangements. Limiting the order only to current agents would defeat the clear intent of the parties in agreeing to settle by rendering the agreement impotent.

Dispute Resolution Procedure

Finally, Realty One attacks the detailed "Dispute Resolution Procedures" incorporated into the settlement order. However, it fails to object to any of the specific provisions in that dispute procedure. Instead, Realty One merely makes the blanket statement that it only agreed that an arbitrator would resolve factual disputes concerning the issuance of an adverse split by Realty One to RE/MAX. Yet, the record reveals a more detailed arbitration agreement. The district court noted on the record that

> the party and agency, RE/MAX agency, as against whom the adverse split was being imposed would have a right to contest that

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herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(J.A. at 206.)

> before a disinterested arbitrator to be chosen by the parties. And the parties would both mutually agree to bear the cost of that arbitration, and both would commit to facilitating that arbitration.
>
> . . .
>
> It's further the agreement of the parties that this right to arbitrate would continue for five years, or for such period of time at which RE/MAX International and its agents reached . . . 20 percent [of the market share] in the . . . North Eastern Ohio area, whichever came first.

(J.A. at 1755-56.). Realty One has not indicated how this agreement is materially different from the mandates of the district court's order and its challenge to the dispute resolution procedures is not well-taken.

Once concluded, a settlement agreement is as binding, conclusive, and final as if it had been incorporated into a judgment. *Clinton St. Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973). Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress. *See, e.g., Aro Corp.*, 531 F.2d at 1372; *Kukla*, 483 F.2d at 621; *cf. Dillow v. Ashland*, 1999 U.S. App. LEXIS 20354, No. 97-6108 at **1-**2 (6th Cir. Aug. 24, 1999) (unpublished) (holding that the district court did not abuse its discretion in enforcing a settlement agreement where the plaintiff agreed on the record to the same material terms enforced by the district court). As our discussion reflects, the material terms are the same as those agreed to on July 13, 2000. Realty One has failed to

point to any material differences that would warrant a finding to the contrary. We therefore hold that the district court's enforcement order was not an abuse of its discretion.

CONCLUSION

For the foregoing reasons, the district court properly retained and exercised jurisdiction over the settlement agreement, and did not abuse its discretion in enforcing the agreement. The district court's judgment is therefore **AFFIRMED.**

DISSENT BY:

J. Clifford Wallace

DISSENT:

WALLACE, Circuit Judge, dissenting. Because I conclude that the district court did not retain jurisdiction to enforce the settlement agreement, I dissent. The appeal should be dismissed.

To retain jurisdiction to enforce a settlement agreement, a district court must either include a "separate provision [in the order of dismissal] (such as a provision 'retaining jurisdiction' over the settlement agreement) or . . . incorporate the terms of the settlement agreement in the [dismissal] order." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994). In this case, the majority argues that the district court had jurisdiction to enforce the settlement agreement because it included a provision in its order of dismissal

" 'retaining jurisdiction' over the settlement agreement." *Id.*

The order of dismissal states:

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

FURTHER, any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

By its plain meaning, the order gives the court the authority to *alter* the terms of the settlement agreement not the authority to *enforce* it. If the court wanted to retain jurisdiction to *enforce* the agreement, it could easily have so stated in the order. This appears clear on the face of the order.

But to the majority, a court may exercise ancillary jurisdiction over a settlement agreement if its order of dismissal contains "some sort of indication that the court has retained jurisdiction." Thus, the majority appears to argue that a partial reservation of jurisdiction by the district court in its dismissal order really operates as a total reservation of jurisdiction. For example, apparently the majority would hold that a district court's reservation of jurisdiction in a dismissal order over a settlement agreement for ninety days is actually a reservation of jurisdiction for an indefinite period of time or that a district court's reservation of jurisdiction in a dismissal order over one provision in a settlement agreement is really a reservation of jurisdiction over the whole agreement. In other words, the district court's dismissal order

in this case does not mean what it clearly says but, instead, means what this court thinks it should have said.

I cannot accept this approach, nor is it consistent with Supreme Court precedent. The Court, reminding us that federal courts are courts of limited jurisdiction, held in *Kokkonen* that there is a presumption against a determination of federal jurisdiction and that federal court jurisdiction should "not be expanded by judicial decree." 511 U.S. at 377. It further held that, while a district court may reserve jurisdiction to enforce a settlement agreement, it must do so in its dismissal order. 511 U.S. at 381. The majority opinion is contrary to the Supreme Court's ruling in *Kokkonen* because it disregards the presumption against federal jurisdiction and expands the district court's jurisdiction to enforce the settlement agreement beyond the plain meaning of the dismissal order.

The majority's approach is also inconsistent with our own precedent. In *McAlpin v. Lexington Auto Truck Stop, Inc.*, 229 F.3d 491, 502 (6th Cir. 2000), we held, citing our earlier decision in *Caudill v. North American Media Corp.*, 200 F.3d 914 (6th Cir. 2000), that we had "joined other circuits in strictly applying the holding in *Kokkonen*." The majority argues that our previous rulings in *McAlpin* and *Caudill* are not binding because they address the scope of *Kokkonen's* second basis for a court's ancillary jurisdiction to enforce a settlement agreement-incorporation of the settlement agreement's terms in the dismissal order – and not the first basis: the inclusion of a "provision 'retaining jurisdiction' over the settlement agreement" in the dismissal order. 511 U.S. at 381.

I do not see, and the majority does not explain, why this distinction is meaningful. We have construed ancillary jurisdiction under *Kokkonen* narrowly because, as I stated, federal courts are courts of limited jurisdiction. *McAlpin* 229 F.3d at 501 (quoting *Kokkonen*, 511 U.S. at 378). This reasoning applies with equal force regardless of whether the district court incorporates the settlement agreement in the order of dismissal or includes a provision in the dismissal order reserving jurisdiction. If the majority opinion has not created a conflict among holdings in this circuit, it has created a conflict in the reasoning of its opinions.

Moreover, the holding in one of our earlier decisions is especially relevant to this case. In *McAlpin*, we outlined the contours of the second basis for a district court's ancillary jurisdiction to enforce a settlement agreement. We held that a "district court's incorporation in its dismissal order of only *one term* of the Settlement Agreement . . . is insufficient to confer jurisdiction over the *entire* agreement." 229 F.3d at 502 (emphasis added). It is true that in this case we are addressing the first basis for ancillary jurisdiction under *Kokkonen* and not the second. Yet we are really deciding the same issue: whether a partial reservation of jurisdiction over the enforcement of a settlement agreement really acts as a complete reservation. In its reliance upon a narrow distinction, the majority has eclipsed our ruling in *McAlpin* and created an unnecessary conflict in our rulings.

The majority relies upon cases from the Fifth and Seventh Circuits when it argues that a district judge need not employ formulaic language in a dismissal order to retain jurisdiction to enforce a settlement agreement. I

agree. But the majority goes well beyond this. It seeks to divine the district court's intent different from the plain language of the order when there is no evidence of that intent contemporaneous to the dismissal order. It may be (although I have considerable doubt) that a look beyond the language of the dismissal order to the assumed district judge's intent would be appropriate if the dismissal order were ambiguous and if there was strong circumstantial evidence at the time of the order that a district judge did, indeed, have a certain intent. But such is not the case here. The dismissal order's language is unambiguous and there is no such circumstantial evidence. To the extent the cases of our sister circuits cited by the majority are inconsistent with this view, I would disregard them.

Federal jurisdiction is a precise doctrine. It does not exist here. I would rely upon the reasoning in *Kokkonen* and our own case law and hold that the district court did not have jurisdiction to enforce the settlement agreement. RE/MAX should have brought a separate claim in state court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

RE/MAX INTERNATIONAL, et al, Plaintiff(s),	)	CASE NO. 1:94-CV-62
	)	JUDGE JAMES S. GWIN
v.	)	JUDGEMENT
REALTY ONE, INC., et al, Defendant(s).	)	

On September 5, 2000, Plaintiff RE/MAX International, Inc. ("RE/MAX") filed a motion to enforce its settlement agreement with Defendant Realty One, Inc. ("Realty One") [Doc. 897].[1] For the reasons set forth below, the Court grants the motion.

I.

The settlement agreement in question resolved a protracted antitrust dispute between Plaintiff RE/MAX and Defendants Realty One and Smythe Cramer. According to RE/MAX, Realty One and Smythe Cramer violated the Sherman Antitrust Act and analogous state laws by paying brokers associated with RE/MAX's franchisees lower commissions on split commission transactions.

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[1] Plaintiff RE/MAX separately filed a motion seeking an order enforcing settlement with Defendant Smythe Cramer, Co. ("Smythe Cramer") [Doc. 896]. Since this filing, Plaintiff RE/MAX and Defendant Smythe Cramer have resolved their issue.

On January 11, 1994, Plaintiff RE/MAX, along with its franchisees, filed an antitrust suit against the defendants in the United States District Court for the Northern District of Ohio.[2] After District Court Judge Dowd granted defendants' motions for summary judgment as to Plaintiff RE/MAX's federal and state antitrust claims, *RE/MAX International Inc. v. Realty One Inc.*, 924 F. Supp 1474 (N.D. Ohio 1996), RE/MAX appealed. The United States Court of Appeals for the Sixth Circuit reversed. *See Re/Max Intern., Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999). Upon remand, this case proceeded to trial on April 10, 2000.

Judge Dowd bifurcated the trial. After the presentation of the evidence, Judge Dowd instructed the jury to first decide whether the defendants had entered an agreement – an essential element of Plaintiff RE/MAX's federal antitrust claim. Following deliberations, the jury returned a verdict finding that Realty One and Smythe Cramer had illegally agreed to restrain trade.

Judge Dowd then instructed the jury to consider additional elements of Plaintiff RE/MAX's claims. During deliberations on these issues, the jurors posed a question that suggested the jurors had misunderstood Judge Dowd's instructions regarding their earlier deliberations.

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[2] As used here, "Plaintiff RE/MAX") [sic] is a collective reference to RE/MAX International, Inc., RE/MAX Northeast Ohio Limited Partnership, ("RE/MAX Northeast Ohio"), and McGrew Realty, Inc., Property Professionals, Inc., T.M.A.T.N.B., Inc., A.E.B.T.S., Inc., Joseph P. Grady, Inc., D.F.I., Inc., Zames Realty, Inc., Advantage Realty, Inc., Realty Properties, Inc., R.E.P., Inc., and True Independents Partnership (collectively, the "Franchisee Plaintiffs").

Finding the earlier misunderstanding could not be corrected, Judge Dowd declared a mistrial on June 26, 2000. After declaring a mistrial, Judge Dowd scheduled a new trial for August 7, 2000 [Doc. 854]. On that same day, the case was transferred to this Court's docket [Doc. 855]. Settlement negotiations commenced shortly thereafter.

Specifically, on June 29, 2000, the Court appointed Judge Dowd to mediate settlement discussions with the parties [Doc. 859]. After Judge Dowd's efforts to mediate the dispute were unsuccessful, the Court conducted mediation with the parties on July 11, 12, and 13, 2000.

The settlement discussions focused on two areas. First, the parties considered a monetary settlement for Plaintiff RE/MAX's claims. Second, the parties discussed limitations regarding future commission splitting and related matters.

After many hours of negotiations, the parties significantly narrowed their gap with regard to a monetary settlement. At this point, the parties' attention shifted primarily to the issues associated with their future commission-splitting relationship.

On July 13, 2000, Plaintiff RE/MAX and Defendant Smythe Cramer reached a comprehensive settlement agreement. The Court then asked RE/MAX and Smythe Cramer to state the general terms of their agreement on the record. The parties did so, and stated their understanding, confirmed by the Court on the record, that they would complete a written settlement agreement within forty-five days.

At the time the RE/MAX-Smythe Cramer settlement was reached, Defendant Realty One had refused to settle with Plaintiff RE/MAX. Realty One would not agree to the same limitations upon future conduct to which Defendant Smythe Cramer had agreed.[3]

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[3] Within itself, Defendant Realty One appeared to have different interests. These different interests impaired Realty One's willingness to settle.

After summary judgment had been given but before the Sixth Circuit had reversed Judge Dowd's grant of summary judgment, the former owners of Realty One sold their interest in Realty One to Insignia Financial Group, Inc. As part of their sales agreement for Realty One, the former owners agreed to indemnify Realty One for expenses and any judgment associated with this case. After the Sixth Circuit reversed the grant of summary judgment, these former owners became contractually obligated to defend and indemnify Realty One for expenses and any judgment in this case. Because of this contractual obligation, these former owners have already indemnified many millions of dollars of expenses and fees including expenses and fees generated in the first trial that had lasted more than ten weeks.

In seeking to settle Plaintiff RE/MAX's claims against Defendant Realty One, the former owners were able to reach an agreement in principal [sic] for financial payments sufficient to satisfy Plaintiff RE/MAX. As to such financial payments on behalf [sic] Realty One, Insignia Financial Group, Inc. refused to make any contribution. Insignia Financial Group refused contribution even though some argument existed that the former owners duty to indemnify and defend only extended to claims arising during their tenure, not to claims or damages arising during Insignia's ownership.

Although the former owners of Defendant Realty One offered sufficient monies to settle Plaintiff RE/MAX's claim, the current management of Realty One refused to agree to the same limitations on conduct agreed to by Defendnt Smythe Cramer. Of course, Smythe Cramer was paying its own expenses and

However, as Plaintiff RE/MAX and Defendant Smythe Cramer confirmed their agreement on the record, Defendant Realty One unexpectedly stated that it desired a settlement on the same terms as to future conduct that Plaintiff RE/MAX had agreed upon with Smythe Cramer. Only minutes before this, Defendant Realty One had refused to reach settlement on these same terms and had professed itself ready for trial.

Plaintiff RE/MAX agreed to Defendant Realty One's offer to agree to the same terms regarding future conduct as negotiated by Defendant Smythe Cramer. With its change of face and speedy retreat from its professed willingness to allow a jury to decide its liability, Defendant Realty One agreed to pay much more than the amount agreed upon by Defendant Smythe Cramer.

II

As a preliminary matter, the Court discusses Defendant Realty One's argument that this Court does not have jurisdiction to rule upon Plaintiff RE/MAX's motion to enforce settlement.

Federal courts are courts of limited jurisdiction. They may exercise only those jurisdictional powers that are authorized by the United States Constitution or a federal

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would be risking its own assets if it proceeded to trial. In contrast, the current owner of Realty One, Insignia Financial Group, Inc. seemed willing to spend the former owner's monies on expenses and risk the former owner's assets to respond to any potential judgment.

statute. *See Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

In this case, Plaintiff RE/MAX originally asserted violations of the federal antitrust laws. Under 28 U.S.C. § 1331, federal courts have original jurisdiction over all claims arising under federal law. Thus, this Court possessed jurisdiction over RE/MAX's original complaint.

However, in seeking to enforce its settlement agreements with the defendants, Plaintiff RE/MAX no longer asserts violations of federal law. Instead, RE/MAX essentially asserts a breach of contract claim. This claim does not fall within the Court's original jurisdiction.

Nevertheless, 28 U.S.C. § 1367 grants federal courts supplemental jurisdiction over claims so related to claims within the court's original jurisdiction that they form part of the same case or controversy under Article III of the Constitution. This grant of supplemental jurisdiction allows a federal court to retain jurisdiction over future enforcement of a settlement agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-81 (1994) (explaining that ancillary jurisdiction allows a court to, among other things, "manage its proceedings, vindicate its authority, and effectuate its decrees"); *Futernick v. Sumpter Township*, 207 F.3d 305, 310 (6th Cir. 2000); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (stating that it is well settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them").

A court need not invoke any magic words to retain jurisdiction to enforce a settlement agreement. Rather, "all that is necessary is that it be possible to infer that [the

trial judge] did intend to retain jurisdiction – that he did not dismiss the case outright, thereby relinquishing jurisdiction." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1188 (7th Cir. 1985).

Specifically, a federal court maintains jurisdiction to enforce a settlement agreement when the parties' obligation to comply with the settlement agreement is "part of the order of dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Futernick*, 207 F.3d at 310 (quoting *Kokkonen*, 511 U.S. at 381).

Here, the language referred to the settlement agreement used by the Court in its order of July 14, 2000, [Doc. 884] makes clear that the Court intended to retain jurisdiction to enforce the agreement.[4] The Court did more than simply refer to the settlement agreement of the parties. *See Caudill v. North American Media Corp.*, 200 F.3d 914, 917 (6th Cir. 2000) (finding district court failed to retain jurisdiction to enforce settlement agreement where

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[4] The Court's order of July 14, 2000, dismissing the case reads in its entirety:

Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After diligent effort on all sides, the parties have settled this [sic] Therefore,

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

FURTHER, Any [sic] subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

dismissal order merely mentioned the settlement agreement). Instead, the Court expressly reserved the right to make further orders regarding the settlement agreement. The Court also explicitly stated that further orders regarding the settlement agreement and the dismissal of the case would supersede the order of July 14, 2000.

This language shows a clear reservation by this Court of jurisdiction over matters concerning the settlement agreement. Accordingly, the Court retains jurisdiction over matters involving the enforcement of the settlement agreement.

III

The Court now turns to Plaintiff RE/MAX's contention that Defendant Realty One failed to keep its settlement agreement. Specifically, RE/MAX says Defendant Realty One has refused to memorialize its settlement.

Arguing otherwise, Defendant Realty One contends that the parties never agreed to memorialize their settlements. The Court disagrees.

At the time the Court recorded the outline of the agreement between Plaintiff RE/MAX and Defendant Smythe Cramer, the parties commented:

> MR. LINIGER [RE/MAX's Chairman]: This becomes effective today *and we would just handle the details?*[5]

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[5] Later, Plaintiff RE/MAX and Defendnt [sic] Smythe Cramer agreed that the agreement would take effect 45 days later.

Shortly after, Defendant Smythe Cramer's Chairman, Lucius McKelvey, confirmed that documentation would be prepared to memorialize the parties agreement:

> MR. McKELVEY: Your Honor, is it implicit that the attorneys are thus mandated *to complete the written agreement within the 45 day time frame, right?*
>
> THE COURT: Yes.
>
> MR. McKELVEY: That's a given.

Plaintiff RE/MAX agreed.[6]

As previously described, Defendant Realty One abruptly decided to settle with Plaintiff RE/MAX on the same terms, except for money, earlier agreed to by Defendant Smythe Cramer. During earlier negotiations, Plaintiff RE/MAX and Defendant Realty One understood that agreement was necessary on all major issues. There was no agreement to settle on some, but not all issues. At the time that Realty One's willingness to go to trial collapsed, no further negotiations occurred. Instead, Realty One simply said it would pay a much larger amount of money to obtain whatever deal Defendant Smythe Cramer had negotiated. Thus, in interpreting Realty One's settlement agreement, the Court finds the negotiations between RE/MAX and Smythe Cramer important, not the negotiations between RE/MAX and Realty One. Moreover, Defendant Realty One acknowledged that the parties would memorialize their settlement agreement. In

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[6] One of Plaintiff RE/MAX's attorney, [sic] Terence Quinn, responded: "Sure, that's fine."

informing the Court of its sudden desire to settle, Realty One itself acknowledged that a written settlement agreement would be prepared. Realty One's surprise retreat occurred as follows:

> THE COURT: I look at my calender, [sic] as against Realty One we are going to start it [the jury trial] on the 7th [August 7, 2000].
>
> MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangement we discussed earlier. I don't know the number.
>
> MR. QUINN: So you are agreeing now to settle?
>
> MR. GORMAN: Yes.
>
> MR. QUINN: Same terms?
>
> MR. GORMAN: Same terms.
>
> * * *
>
> THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $6,666,666.
>
> MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier, the two Avenis, Joe Aveni and Vince Aveni and Jim Miller [the former owners] on behalf of Realty One. And we adopt the same terms and *will draft*

the papers in the same time period.

Accordingly, the Court finds the Plaintiff RE/MAX and Realty One agreed that written documentation of their agreement would be prepared. In failing to agree upon the expression of their agreement, the defendants have failed to comply with their settlement agreement. The Court therefore grants Plaintiff RE/MAX's motion to enforce the parties' settlement.

In granting this motion, the Court enters the following judgment as between Plaintiff RE/MAX and Defendant Realty One:

In this case the Plaintiffs made claims against Smythe, Cramer Co. ("Smythe, Cramer") and Realty One, Inc. ("Realty One") in these actions filed in the United States District Court for the Northern District of Ohio. Realty One denied liability, asserted affirmative defenses as to some or all of those claims and made counterclaims against the Plaintiffs. The Plaintiffs have denied the counterclaims.

After conference with the Court as described above, the parties settled their dispute on July 13, 2000, under the following terms, without admission by any party of liability.

Definitions. As used herein, the following terms shall have the meanings indicated:

(a) "MLS" shall mean a multiple listing service, and shall include, without limitation, both the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Centralized Real Estate Information Services,

Inc. ("CRIS") and Akron Area Multiple Listing Service ("AAMLS"), as well as any successor to either NORMLS, CRIS or AAMLS and any other multiple listing service in which residential properties are or may be listed by defendants in the Northeast Ohio area.

(b) The "Northeast Ohio area" shall consist of those counties that comprise the geographical jurisdiction of the Northern District of Ohio, Eastern Division.

(c) "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(d) "Special notice letter" shall mean a written notification by defendants to a broker in which a defendant (i) offers to compensate the addressee broker on the sale of a defendant listing by the addressee broker or any

of its agents (either as buyer's agent or as subagent) at a level lower than that offered generally by the defendant to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on defendant listings.

(e) "RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

2. *Dismissal of Related Action.* RE/MAX Northeast Ohio shall dismiss with prejudice the action filed in the Cuyahoga County Court of Common Pleas, known as *Thomas Hurd v. Vincent Aveni, et al.*, Case No. 299512.

3. *Plaintiffs' Release and Covenant Not to Sue.* Each Plaintiff, for and on behalf of itself and its principal(s), officers, directors, successors and assigns, will execute releases fully and forever releasing and discharging Defendant Realty One and their principal(s), officers, directors, agents, successors and assigns, of and from any and all claims, demands, actions or causes of action whatsoever, whether known or unknown, including, without limiting the generality of the foregoing, any and all claims, demands, actions or causes of action which were or could have been asserted in the Actions. Each Plaintiff will agree and covenant forever to refrain from instituting, procuring, or directly or indirectly funding any suit, cause of action or claim for relief against Defendant Realty One that in any way relates to or arises from any alleged act or agreement of defendants that occurred

prior to the date of July 13, 2000. Nothing in this paragraph, however, shall be construed to preclude any RE/MAX Broker from asserting any claim or cause of action (a) arising from a property-specific or transaction-specific matter involving a buyer or seller client or (b) coming within the jurisdiction of a Board of Realtors or the Ohio Division of Real Estate.

4. *Defendant Realty One Release and Covenant Not to Sue.* Defendant Realty One for and on behalf of itself and its principal(s), officers, directors, successors and assigns, will execute releases fully and forever releasing and discharging each Plaintiff and its respective principal(s), officers, directors, agents, successors and assigns, of and from any and all claims, demands, actions or causes of action whatsoever, whether known or unknown, including, without limiting the generality of the foregoing, any and all claims, demands, actions or causes of action which were or could have been asserted in the Actions. Defendant Realty One will agree and covenant forever to refrain from instituting, procuring, or directly or indirectly funding any suit, cause of action or claim for relief against any Plaintiff that in any way relates to or arises from any alleged act or agreement of the Plaintiff that occurred prior to July 13, 2000. Nothing in this paragraph, however, shall be construed to preclude Defendant Realty One from asserting any claim or cause of action (a) arising from a property-specific or transaction-specific matter involving a buyer or seller client or (b) coming within the jurisdiction of a Board of Realtors or the Ohio Division of Real Estate.

5. *Settlement Amount.* Defendant Realty One shall pay, and RE/MAX International shall receive on behalf of

each and all of the Plaintiffs, the total amount of Six Million Six Hundred Sixty-Six Thousand Six Hundred Sixty-Six Dollars ($6,666,666), to be paid as follows:

(a) An initial payment of $3,333,333 to be paid within five business days of the entry of this judgment after receipt by Realty One of the releases executed by all of the Plaintiffs; and

(b) Ten semi-annual installment payments, commencing six months after the initial payment and payable each six months thereafter. Each installment payment shall be in the principal amount of $366,666.60 plus interest accrued on the balance of the Gross Payment owed at the time the installment is paid at the rate payable on five year Treasury Bills as of the date of the initial payment under paragraph 5(a). The prepayment of any installment is expressly permitted.

All payments by the Defendant Realty One shall be made by certified check payable to RE/MAX International or its written designee. Defendant Realty One assumes no responsibility for the distribution among Plaintiffs of any payment described herein, and RE/MAX International shall indemnify and hold harmless Defendant Realty One, their principal(s), officers, directors, agents, successors and assigns from any claim, demand, action or cause of action with respect to any matter arising out of such distribution, its amount or the failure to make or receive such a distribution.

6. *Withdrawal of Special Notice Letters.* Defendant Realty One shall withdraw all special notice letters to any

RE/MAX Broker. This withdrawal shall be effective with respect to any offer or counter-offer to purchase or sell a property that has been accepted in writing on or after August 28, 2000. As to any transaction resulting from such an accepted offer or counter-offer and closing on or after August 28, 2000 but prior to receipt by the Defendant Realty One of executed release documents executed by all of the Plaintiffs, any difference between the commission actually paid by Defendant Realty One to the RE/MAX Broker at closing and the commission offered by Defendant Realty One listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter) shall be paid to such RE/MAX Broker no later than ten days after the entry of this Judgment. In addition, Defendant Realty One will stop any policy of issuing a special notice letter to all new RE/MAX franchisees in the Northeast Ohio area.

7. *Future Special Notice Letters.* Effective July 13, 2000, any subsequent issuance of a special notice letter to a RE/MAX Broker in the Northeast Ohio area by Defendant Realty One during the term of the Dispute Resolution Mechanism appended hereto shall be subject to the following conditions:

(a) *Limitations on Future Special Notice Letters.* Defendant Realty One shall not issue any special notice letter to a RE/MAX Broker based, expressly or in purpose and practical effect upon (i) its affiliation with RE/MAX International and/or (ii) its use of the RE/MAX business model. Defendant Realty One may issue a special notice letter to a RE/MAX Broker only for reasons consistent with its policy and practices,

whether currently in effect or hereafter adopted by Defendant Realty One, applicable to all real estate brokers in the Northeast Ohio area.

(b) *Formal Requirements of Special Notice Letters.* Any special notice letter issued by Defendant Realty One to a RE/MAX Broker shall be sent by certified mail, return receipt requested, with a copy to RE/MAX International by certified mail. The terms described in the special notice letter shall not become effective until 30 days after the date that it is mailed. The special notice letter shall state the reasons for Defendant Realty One's decision to take the actions stated in the special notice letter.

(c) *Dispute Resolution.* Any RE/MAX Broker receiving a special notice letter may demand arbitration pursuant to the Dispute Resolution Procedure appended hereto. Any such demand for arbitration must be sent to the defendant by certified mail, return receipt requested, within 90 days from the date of the special notice letter. A failure to send a timely written demand waives all objections to the special notice letter by the RE/MAX Broker.

(d) *Applicability of Dispute Resolution Procedure.* The provisions of and procedures described by the Dispute Resolution Procedure shall be applicable, until its expiration, to all Franchisee Plaintiffs and any other current or future RE/MAX Broker that submits the a [sic] copy of the Dispute Resolution Procedure executed by it with its written agreement to be bound by its terms, and no

Plaintiff or other RE/MAX Broker executing the Dispute Resolution Agreement may assert any claim or cause of action arising from a special notice letter except to enforce the provisions of this Settlement Agreement, the Dispute Resolution Procedure or an arbitration award under it.

(e) *Payment of Commissions When A Special Notice Letter is Invalidated.* In the event that a future special notice letter is required to be withdrawn by the decision of an arbitrator and transactions affected by the special notice letter closed subsequent to its effective date, Defendant Realty One shall pay to the RE/MAX Broker within ten days of that decision any difference between the commission actually paid by the defendant to the RE/MAX Broker at closing and the commission offered by the defendant's listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter).

8. *Construction.* The parties settlement and documentation of that settlement is not construed as an admission of liability or culpability by the Defendant Realty One with respect to any claim made against them in the Actions or otherwise, such liability or culpability being expressly denied by Defendant Realty One. Except as provided in this judgment and the Dispute Resolution Procedure, the Defendant Realty One does not waive, compromise, surrender or abandon any right it has, has had or may have in the future to decide independently the terms upon which it will or will not deal with, or offer to deal with, any real estate broker, such rights, as they

may exist from time to time, being expressly reserved by Defendant Realty One, subject only to the provisions of this Judgment.

9. *Jurisdiction.* This Court shall retain continuing jurisdiction to enforce the provisions of this judgment.

IT IS SO ORDERED.

Date: September 14, 2000

/s/ James S. Gwin
Hon. James S. Gwin
U.S. District Court

DISPUTE RESOLUTION PROCEDURE

In accord with the parties' agreement, the Court orders that the parties shall use the following procedures to resolve their disputes:

1. *Definitions.* As used herein, the following terms shall have the meanings indicated:

(a) "MLS" shall mean a multiple listing service, and shall include, without limitation, both the Northern Ohio Regional Multiple Listing Service ("NORMLS") and the Centralized Real Estate Information Services, Inc. ("CRIS") and Akron Area Multiple Listing Service ("AAMLS"), as well as any successor to either NORMLS, CRIS or AAMLS and any other multiple listing service in which residential properties are or may be listed by Defendant Realty One in the Northeast Ohio area.

(b) The "Northeast Ohio area" shall consist of those counties that comprise the geographical jurisdiction of the Northern District of Ohio, Eastern Division.

(c) "RE/MAX Broker" shall mean any residential real estate brokerage firm (i) operating, at present or in the future, under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International (ii) in the Northeast Ohio area. Without limiting this definition, the Franchisee Plaintiffs are included within the scope of the term "RE/MAX Broker" for the periods during which they operated or operate under their respective franchise agreements. The term "RE/MAX Broker," as used herein, shall not include any Franchisee Plaintiff or other residential real estate brokerage firm that has a court action (other than the Actions and court actions relating to property-specific or transaction-specific matters involving a buyer or seller client) now pending against Defendant Realty One.

(d) "Special notice letter" shall mean a written notification by Defendant Realty One to a broker in which Realty One (i) offers to compensate the addressee broker on the sale of Realty One's listing by the addressee, broker or any of its agents (either as buyer's agent or as subagent) at a level lower than that offered generally by Realty One to other brokers through the listing of the property with an MLS or (ii) declines to co-broke on Realty One's listings.

(e) "RE/MAX business model" shall mean the methods of operating and developing a residential real estate brokerage office, as taught and/or promoted by RE/MAX International to new and existing franchisees.

2. *Formal Requirements of Special Notice Letters.* Any special notice letter issued by Defendant Realty One to a RE/MAX Broker shall be sent by certified mail, return receipt requested, with a copy to RE/MAX International by certified mail. The terms described in the special notice letter shall not become effective until 30 days after the date that it is mailed. The special notice letter shall state all the reasons for Realty One's decision to take the actions stated in the special notice letter.

3. *Objection to Special Notice Letter and Demand for Arbitration.* A RE/MAX Broker that has received and objects to a special notice letter from Defendant Realty One may demand arbitration as specified in paragraph 4(b). Any such demand for arbitration shall be in writing and must be sent to Realty One within 90 days from the date of the special notice letter. Failure to send a timely written demand waives all objections to the special notice letter by the RE/MAX Broker.

4. *Dispute Resolution Procedures.*

(a) *Informal Discussions.* The parties agree to use good faith efforts to resolve issues relating to the issuance of special notice letters without proceeding to arbitration, including, without limitation, withdrawal of a special notice letter where the conduct or circumstance giving rise to the issuance of it has been cured.

(b) *Arbitration Procedure.* The Arbitrator shall expeditiously conduct a hearing to determine the validity of the stated ground(s) for the RE/MAX Broker's objection(s). The parties shall use their best efforts to arrange for the hearing within 30 days of the demand for arbitration. The Arbitrator shall order discovery between the parties on the issue presented to the extent needed and appropriate. The Arbitrator shall have sole authority to hear an objection under this Dispute Resolution Procedure, establish the procedural rules for the hearing, adjudicate procedural or discovery disputes and determine any other matters the parties may agree to submit to him. To the extent consistent with this Dispute Resolution Procedure, the procedures prescribed or authorized by the Ohio Arbitration Act, Ohio Rev. Code § 2711.01, *et seq.*, shall be employed in any arbitration hereunder.

(c) *Issues to Be Determined.* The Arbitrator shall decide whether Defendant Realty One's decision to issue the special notice letter at issue was: (i) based, whether expressly or in purpose and practical effect, upon the RE/MAX Broker's affiliation with RE/MAX International, (ii) or its use of the RE/MAX business model; (iii) made other than independently; or (iv) made in a manner or for reasons inconsistent with Realty One's policies and practices applicable to all real estate brokers in the Northeast Ohio area. The burden of proof shall be on the RE/MAX Broker to establish the foregoing issues by a preponderance of the evidence. If any of the foregoing issues is decided in

the affirmative by the Arbitrator, then the RE/MAX Broker shall be the prevailing party, and Defendant Realty One shall immediately withdraw the special notice letter. If all of the foregoing issues are decided in the negative by the Arbitrator, then Realty One shall be the prevailing party, and the special notice letter shall remain in effect.

(d) *Effect of Arbitrator's Decision.* In the event that a future special notice letter is required to be withdrawn by the decision of an arbitrator and transactions affected by the special notice letter closed subsequent to its effective date, Defendant Realty One shall pay to the RE/MAX Broker within ten days of that decision any difference between the commission actually paid by Realty One to the RE/MAX Broker at closing and the commission offered by Realty One's listing of the property in the relevant MLS (to all cooperating brokers that have not received a special notice letter).

(e) *Arbitrator's Decision Binding.* The Arbitrator's determination shall be binding and final. All proceedings shall be conducted and enforceable in accordance with, and subject to, the Ohio Arbitration Act, Ohio Rev. Code. § 2711.01, *et seq.* The Arbitrator's decision shall not be admissible as evidence or have any precedential effect in any subsequent arbitration or proceeding by or among the parties concerning the issuance of another special notice letter; provided, however, a previous decision or

award may be used to establish that a subsequent dispute between a RE/MAX Broker and Defendant Realty One was decided already as between the same RE/MAX Broker and Realty One in a previous arbitration with respect to the same or previous special notice letter.

5. *Appointment of Arbitrator.*

(a) *Initial Appointment.* Within 10 days from the date a demand for arbitration is received by Defendant Realty One the parties agree jointly to select and appoint an arbitrator to whom the dispute shall be submitted. If the parties cannot agree upon an arbitrator within the 10 day period, either party may demand that an arbitrator be appointed by the American Arbitration Association ("AAA") from a list of potential arbitrators with knowledge of real estate law and the residential real estate brokerage business. Under no circumstances shall an arbitrator be appointed by the AAA who is or has been (i) a member of the Ohio Association of Realtors or of any Board of Realtors in the Northeast Ohio area, including, without limitation, the Cleveland Area Board of Realtors; (ii) a sales agent, employee or principal of RE/MAX International or any RE/MAX franchisee, sub-franchisee or affiliate; or (iii) a sales agent, employee or principal of Defendant Realty One or any affiliate thereof, or any current or former member of the groups known or formerly known as The Dozen or The Masterminds. By this appointment, the parties irrevocably waive any objection to the Arbitrator

under this Dispute Resolution Procedure other than objections based upon bias or financial interest, which must be established by clear and convincing evidence.

(b) *Arbitrator's Duty.* Any arbitrator must agree to serve and to conduct the arbitration in accordance with the terms of this Dispute Resolution Procedure.

6. *Costs.* The parties to any arbitration under this Dispute Resolution Procedure will each pay one half of the Arbitrator's fee and incidental expenses. The parties otherwise will bear their own costs.

7. *Waiver of Other Remedies.* The parties irrevocably waive any and all rights to adjudicate any objection to or claim arising from a special notice letter in any forum other than the proceedings described in this Dispute Resolution Procedure.

8. *Termination of this Dispute Resolution Procedure.* This Dispute Resolution Procedure shall expire July 13, 2005, or at such time as those brokers operating under a franchise agreement with RE/MAX International or a regional subfranchisor of RE/MAX International have entered into residential real estate listing agreements constituting 20% of all residential listings (measured by number of listings) processed in the Northeast Ohio area during any calendar quarter, whichever shall first occur.

9. *Applicability.* The provisions of and procedures described by this Dispute Resolution Procedure shall be applicable, until its expiration, to all current RE/MAX Brokers and any future RE/MAX Broker that submits a copy of the Dispute Resolution Procedure executed by it

with its written agreement to be bound by its terms, and no Plaintiff or future RE/MAX Broker executing the Dispute Resolution Procedure may assert any claim or cause of action arising from a special notice letter issued on or after the date of the Settlement Procedure except to enforce the provisions of the Settlement Agreement, the Dispute Resolution Procedure or an arbitration award thereunder.

10. *Notices.* All notices and communications to Defendant Realty One in connection with this Dispute Resolution Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

Realty One, Inc.
Realty One Corporate Center
6000 Rockside Woods Boulevard
Cleveland, Ohio 44131-2350
Attention: Chairman

All notices and communications to RE/MAX International in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

RE/MAX International, Inc.
David L. Liniger
8390 East Crescent Parkway
Greenwood Village, Colorado 80111-28000

All notices and communications to RE/MAX Northeast Ohio in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to:

RE/MAX Northeast Ohio, Inc.
Sylvia Babineau
P.O. Box 8172
Longboat Key, Florida 34228

All notices and communications to the Plaintiff Franchisees in connection with this Settlement Procedure unless otherwise designated shall be directed by certified mail, return receipt requested, to the relevant party:

D.F.I., Inc.
Dennis Falvey
9954 Johnnycake Ridge Road
Concord, Ohio 44077

Zames Realty, Inc.
Robert Zames
10556 Clear Lake Drive
Concord, Ohio 44077

McGrew Realty, Inc.
Carol McGrew
724 Diandrea Drive
Akron, Ohio 44333

RE/MAX Advantage, Inc.
Donald Greif/James Sinkula
6693 Miller Drive
North Ridgeville, Ohio 44039

Property Professionals, Inc.
Yvonne Highley
116 North Main Street
Hudson, Ohio 44236

Realty Properties, Inc.
Sylvia Babineau
P.O. Box 8172
Longboat Key, Florida 34228

T.M.A.T.N.B., Inc.
Dennis Steed
13500 Pearl Road
Strongsville, Ohio [sic]

R.E.P., Inc.
Joseph Steets
8004 Hillside Road
Independence, Ohio 44131

A.E.B.T.S., Inc.
Dennis Steed
13500 Pearl Road
Strongsville, Ohio 44136

True Independent Realty
Thomas Hurd
12550 Lake Avenue #1004
Lakewood, Ohio 44107

Joseph P. Grady, Inc.
Joseph Grady
3225 Amblewood Court, NE
Atlanta, Georgia 30345

Copies of all notices and communications hereunder to any other Plaintiff shall also be mailed to RE/MAX International at the address set forth above.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

RE/MAX INTERNATIONAL, et al,	)	
	)	Case No 1:94cv62
Plaintiff(s),	)	1:96cv101
	)	
-vs-	)	
REALTY ONE, INC., et al,	)	ORDER
	)	
Defendant(s).	)	

Pretrial/Settlement conferences were held in the above-captioned matter on July 11, 2000 – July 13, 2000. During said conferences, settlement talks took place. After a diligent effort on all sides, the parties have settled this Therefore,

IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice".

FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

/s/ James S. Gwin
JUDGE JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RE/MAX INTERNATIONAL, et al.,	)	
Plaintiffs,	)	Civil Action No.
vs.	)	1:94cv62
REALTY ONE, INC., et al,	)	
Defendants.	)	

TRANSCRIPT OF SETTLEMENT AGREEMENT HAD BEFORE THE HONORABLE JAMES S. GWIN, JUDGE OF SAID COURT, ON THURSDAY, JULY 13, 2000 AT 4:15 O'CLOCK P.M.

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Court Reporter: Richard G. DelMonico
568 U.S. District Court
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

[3] THE COURT: This is case number 94-CV-062, RE/MAX international versus Realty One, et al, including defendant Symthe,* Cramer Company.

The case came before the court today for purposes of a final pretrial. After discussions with defendant Symthe, Cramer Company and the plaintiffs, the parties have settled their dispute. Under the terms of that settlement, the Defendant Symthe, Cramer Company would pay to the plaintiff the sum of $3,666,666.

---

* Smythe is misspelled throughout this transcript which is reproduced verbatim.

In consideration for this payment, together with certain additional covenants and agreements, upon consideration of this payment, the plaintiffs would dismiss this case as against that defendant only, with prejudice, and would execute releases as running against all of Symthe, Cramer Company and its principals and agents.

In addition to this payment, the parties have agreed upon certain additional matters. Under t-hose [sic] additional matters, the plaintiff would accept the payment of this $3,666,666 over some period of time. That payment would be made with an initial down payment, approximating one half of that amount, to be made within a reasonable time, plaintiffs then agreeing to accept payments on the remaining balance over a period of, I believe we talked about, five years, which balance would be payable with [4] interest at, believe the discussion was, prime plus one.

MR. McKELVEY: Your Honor, that was thrown cut [sic]. We would recommend whatever the five year paper is, whatever the five year T bill rate is. We don't borrow it at prime, we borrow it below prime. Whatever the five year T bill rate is.

THE COURT: Is that acceptable?

MR. LINIGER: Yes.

THE COURT: In further consideration of the dismissal of this action, the defendant Symthe, Cramer would agree to stop the adverse split policy as against all RE/MAX principals and agents.

Going into the future. The defendant Symthe, Cramer would have the right to impose adverse commission splits under the following terms:

First, before imposing such adverse splits Symthe, Cramer would give notice at least 30 days before the imposition of those adverse splits, setting forth all reasons for the split.

The party and agency, RE/MAX agency, as against whom the adverse split was being imposed would have a right to contest that before a disinterested arbitrator to be chosen by the parties. And the parties would both mutually agree to bear one half the cost of that arbitration, and both would commit to facilitating that [5] arbitration.

It is further agreed, with regard to the imposition of adverse splits, that the defendant Symthe, Cramer would not impose any adverse splits based upon the business model used by plaintiff RE/MAX or its agents, and would do so only for reasons consistent with the imposition of adverse splits among other real estate agencies in the Cleveland, Ohio area.

MR. McKELVEY: Can we say North Eastern Ohio, your Honor?

THE COURT: North Eastern Ohio.

Is that the agreement that has been reached, Mr. Quinn, on behalf of your client?

MR. QUINN: I'm just checking my notes.

MR. LINIGER: This becomes effective today and we would just handle the details?

MR. McKELVEY: May I ask that –

THE COURT: Let's just go off the record.

(Discussion off the record.)

THE COURT: This would go into effect within 45 days.

It's further the agreement of the parties that this right to arbitrate would continue for five years or for such period of time at which RE/MAX International and its agents reached, I believe the agreement was, 15 [6] percent.

MR. QUINN: 20 percent, your Honor, was the agreement.

THE COURT: 20 percent in the Cleveland, North Eastern Ohio area, whichever came first. Is that the agreement you've reached?

MR. LINIGER: Yes, sir, it is.

THE COURT: Mr. Quinn?

MR. QUINN: Yes, it is.

THE COURT: Mr. Eklund.

MR. EKLUND: Yes.

THE COURT: Mr. McKelvey?

MR. McKELVEY: May I have just one second, your Honor?

THE COURT: And just to be clear, each party to bear their own attorneys fees, and each party to bear their own costs.

MR. McKELVEY: Your Honor, is it implicit the attorneys are thus mandated to complete the written agreement within the 45 day time frame, right?

THE COURT: Yes.

MR. McKELVEY: That's a given.

THE COURT: Yes.

MR. QUINN: Sure, that's fine.

THE COURT: Is that the agreement, Mr. Eklund.

[7] MR. EKLUND: Yes.

THE COURT: Mr. McKelvey?

MR. McKELVEY: Yes.

THE COURT: Thank you very much.

MR. McKELVEY: Thank you, your Honor.

THE COURT: I looked at my calendar, as against Realty One we are going to start it on the 7th.

MR. GORMAN: As to Realty One, we are in agreement to the financial terms we discussed earlier, same terms to the financial arrangements we discussed earlier. I don't know the number.

MR. QUINN: So you are agreeing now to settle?

MR. GORMAN: Yes.

MR. QUINN: Same terms?

MR. GORMAN: Same terms.

MR. QUINN: 10 million – No, that's the total. $6,666,666.

MR. GORMAN: $6,666,666 is for Realty One.

THE COURT: Just to be clear, under the same terms, Mr. Gorman, with the exception being that Realty One would pay the sum of $6,666,666.

MR. GORMAN: Yes, your Honor, Realty One would pay that sum coming from, as mentioned earlier., the two Avenis, Joe Aveni and Vince Aveni and Jim Miller on behalf of Realty one. And we adopt the same terms and will draft [8] the papers in the same time period.

THE COURT: Is that acceptable to you?

MR. QUINN: Yes, it is.

THE COURT: Thank you very much.

MR. McKELVEY: Thank you for your hard work and your creativity.

CERTIFICATE

I, Richard G. DelMonico, Official Court Reporter in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

/s/ Richard G. DelMonico
Richard G. DelMonico,
Official Court Reporter
404 U.S. Courthouse
Two South Main Street
Akron, Ohio 44308
(330) 535-2280

Federal Rules of Civil Procedure

Rule 41. Disr issal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation.

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action.

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Filed Under Seal

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4235 –

RE/MAX INTERNATIONAL, INC., *et al.*,
Plaintiffs-Appellees,

RE/MAX NORTHEAST OHIO LIMITED PARTNERSHIP, *et al.*,

Intervenors-Appellees,

v.

REALTY ONE, INC.,

Defendant-Appellant,

SMYTHE CRAMER CO.,

Defendant

Appeal from the United States District Cow [sic]
for the Northern District of Ohio, Eastern Division
Case Nos. 1:94 CV 0062 & 1:96 CV 0101

FINAL BRIEF OF APPELLEES

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* * *

Finally, Realty One asserts that "permitting the court here to use a post dismissal construction of vague language would eviscerate *Kokkonen*." Def. Br. at 34. Realty One does not – and cannot – explain why this is so. Permitting the district court to exercise jurisdiction here makes good sense. The parties reached settlement only after a long and bitter dispute spanning years of litigation, an appeal, and a three-month trial, and the settlement imposed significant restrictions upon the defendants' future conduct. Under such circumstances. there was an obvious risk of dispute over the details of the written agreement, and it was therefore prudent and responsible for the judge who supervised the settlement to retain jurisdiction.

B. The District Court Could Not Have Relinquished Jurisdiction Over The Settlement on July 14.

In addition to relying upon a non-existent requirement, Realty One also mistakenly assumes that the district court had authority on July 14 to dismiss this case unconditionally under Rule 41(a)(2). That rule deals with voluntary dismissal and provides that "an action shall not be dismissed *at the plaintiff's instance* save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2) (emphasis added). Thus, the rule "requires the plaintiff to move for leave to dismiss by order of the Court." 8 James Wm. Moore *et al.*, *Moore's Federal Practice* § 41.20, at 41-29 (3d ed. 2000). RE/MAX did not, however, file such a motion (or enter into a stipulation of dismissal as in *Kokkonen*). Nor could the district court have found that RE/MAX implicitly requested dismissal: although RE/MAX promised that it "would dismiss this case," it did so "[i]n consideration for [a multi million dollar] payment, together with certain additional covenants and agreements." Settlement TR 3. Since those obligations did not become effective until August 28, *see supra p. 10*, the district court could not have unconditionally dismissed the case on July 14 even if it had tried. *See, e.g., MGM. v. 007 Safety Prods.*, 83 F.3d at 14; *Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 392 (1st Cir. 1999); *Ford v. Neese*, 119 F.3d at 562.

II. REALTY ONE BREACHED ITS DUTY TO COMPLETE A WRITTEN SETTLEMENT AGREEMENT.

In the decision below, the district court found that Realty One had an obligation to complete a written settlement agreement and that Realty One breached that obligation. *See* Judgment at 7-10. On appeal, Realty One no longer seriously disputes the existence of this obligation. Instead, it contends that the district court erred in finding a breach. *See* Def. Br. at 53-55. To do so, however, Realty One must show that Judge Gwin committed plain error. *See supra p.* 20. Realty One does not even begin to satisfy this heavy burden. To the contrary, the

* * *

order to ensure that RE/MAX enjoyed the efficient remedy for which it had bargained.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Dated: March 16, 2001

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
MAR 13 2002
CLERK

No. 01-1154

IN THE

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in exercising ancillary jurisdiction to enforce a settlement where the order dismissing the underlying case retained jurisdiction to issue superseding orders "setting forth different terms and conditions relative to the settlement" and the district court found that its order was intended to retain jurisdiction over enforcement of the settlement.

CORPORATE DISCLOSURE STATEMENT

The respondents in this matter are:

RE/MAX International, Inc.; A.E.B.T.S., Inc. d/b/a RE/MAX Crossroads Properties; T.M.A.T.N.B., Inc. d/b/a RE/MAX Affinity, Inc.; D.F.I., Inc. d/b/a RE/MAX Results; Joseph P. Grandy, Inc. d/b/a RE/MAX Xpress; McGrew Realty, Inc. d/b/a RE/MAX Key Realty; Property Professionals, Inc. d/b/a RE/MAX Property Professionals; RE/MAX Advantage, Inc. d/b/a RE/MAX Advantage; RE/MAX Northeast Ohio Limited Partnership; Zames Realty, Inc. d/b/a RE/MAX Specialists in Real Estate; Realty Properties, Inc. d/b/a RE/MAX Realty Properties; True Independence Partnership d/b/a RE/MAX Independent Associates; and R.E.P., Inc. d/b/a RE/MAX Realty.

Respondents are all privately held companies, and none has any publically held subsidiaries or affiliates.

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Respondents RE/MAX International, Inc. *et al.* (collectively, "RE/MAX") respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

INTRODUCTION

In the proceedings below, after extensive negotiations mediated by the district court, the parties agreed on the record to settle their claims and to reduce the terms of that settlement to writing within forty-five days. The next day, the district court *sua sponte* issued a dismissal order that expressly retained jurisdiction to issue subsequent orders "setting forth different terms and conditions relative to the settlement and dismissal of the within action." Pet. App. 67a. Interpreting this reservation of jurisdiction to cover enforcement of the settlement, both the district court and the court of appeals concluded that the district court had jurisdiction under this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), to remedy petitioner Realty One's breach of the settlement. This ruling does not warrant further review.

Realty One has not shown that this question merits the attention of this Court. Contrary to Realty One's assertions, there is no conflict between the holding below and those of other courts of appeals; indeed, Realty One has failed to identify any other case involving a dismissal order with a similar reservation of authority. There is also no conflict between the decision below and *Kokkonen* because *Kokkonen* did not address the proper method for construing the scope of a reservation of authority and because the decision below correctly held that the dismissal order retained authority to remedy Realty One's breach of the settlement. Finally, these issues—and the question presented—have been mooted by a concession in the petition.

STATEMENT

1. Respondent RE/MAX International, Inc. franchises an innovative and highly successful real estate brokerage system, which attracts experienced real estate agents by offering them a greater percentage of commissions than traditional real estate brokers pay. Resp. App. 4a-5a. Petitioner Realty One, a traditional real estate broker, is the largest broker in Northeast Ohio in terms of market share. Resp. App. 8a. When RE/MAX International sought to enter Northeast Ohio, Realty One and Smythe Cramer, Inc., the second largest broker in the area, responded by repeatedly and "almost simultaneously" over the course of a thirteen-year period imposing "adverse commission splits" on RE/MAX franchisees. Resp. App. 11a-12a. Under this adverse-split policy, in cooperative transactions involving their listings, both Realty One and Smythe Cramer reduced the share of commissions paid to RE/MAX brokers well below the share customarily and almost uniformly paid to other brokers. Resp. App. 4a, 9a-12a.

When RE/MAX uncovered direct evidence that Realty One and Smythe Cramer had imposed the adverse splits as part of a conspiracy to prevent it from entering Northeast Ohio, Resp. App. 25a, it sued them for violations of state and federal antitrust laws. During discovery, RE/MAX developed further evidence of an illegal conspiracy, including expert testimony that it would have been economically irrational for Realty One and Smythe Cramer to impose adverse splits against RE/MAX franchisees for any substantial period absent an agreement between them. Resp. App. 22a-25a. Although the district court found this and other evidence of a conspiracy insufficient to create a genuine issue of material fact, the court of appeals disagreed and remanded the case for trial. *Id.* at 26a-27a.

In the first phase of the trial, the jury found that Realty One had, in fact, agreed with Smythe Cramer to impose adverse

splits on RE/MAX franchisees. Pet. App. 4a. Later, however, the trial judge *sua sponte* determined that the jury had misunderstood an earlier instruction and declared a mistrial.[1] *Id.*; J.A. 1735-44.

2. The case was subsequently transferred to a new judge, who successfully mediated a settlement between RE/MAX and Smythe Cramer. Pet. App. 5a. On July 13, 2000, the general terms of the settlement were read into the record, Pet. App. 69a-73a, and RE/MAX and Smythe Cramer agreed to delay the effectiveness of the agreement for 45 days so that they could "complete the written agreement." Pet. App. 71a-73a.

As the district court began to schedule a new trial on the claims against Realty One, Realty One announced that it would agree to settle the case on the same terms as Smythe Cramer, with the sole exception that Realty One would pay RE/MAX nearly twice as much as Smythe Cramer had agreed to pay. Pet. App. 7a & n.3. In so doing, Realty One promised to "draft the papers in the same time period." Pet. App. 7a n.3, 74a. Several days later, in a press release and a company newsletter, Realty One confirmed that the settlement contemplated a more formal, detailed, written agreement. Pet. App. 8a.

3. On July 14, 2000, the day after the settlement was reached, the district court *sua sponte* ordered:

> that the docket be marked, "settled and dismissed with prejudice".

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[1] The district court judge determined that the instruction, which was drawn from an ABA model instruction, had allowed the jury to find an illegal conspiracy based on an agreement to continue the adverse splits after they had been imposed unilaterally. J.A. 1735-38. In fact, however, such agreements can constitute illegal conspiracies under the antitrust laws. *See, e.g.*, VI Phillip E. Areeda, *Antitrust Law* § 1410, at 67 (1986).

> FURTHER, Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

Pet. App. 67a.

4. Eleven days later, RE/MAX sent both Smythe Cramer and Realty One written drafts memorializing their respective settlements. Pet. App. 8a. Smythe Cramer thereafter worked with RE/MAX to finalize both the written language and the non-essential details of their agreement. Realty One, however, refused to respond to RE/MAX's draft for weeks and then denied that it was under any obligation to enter into a formal written agreement at all. Pet. App. 8a-11a.

As the settlement's 45-day deadline for producing a written document approached, RE/MAX requested a status conference with the district court because of Realty One's refusal to negotiate over the document. At the conclusion of the conference, the court instructed the parties to continue negotiating during the upcoming Labor Day weekend and directed RE/MAX to file a motion to enforce the following Tuesday if an agreement was not reached by then. Pet. App. 12a. Realty One frustrated these negotiations by, among other things, failing to explain any of its concerns with RE/MAX's draft until Monday (Labor Day) night and waiting until then to propose a lengthy and substantially different alternative draft. *Id.*

5. RE/MAX moved to enforce the next day. Although neither party requested an evidentiary hearing, Pet. App. 12a-13a, both RE/MAX and Realty One provided the district court with multiple written submissions in connection with the motion to enforce. *See* J.A. 727-33, 1006-16, 1243-69, 1403-25, 1512-25.

Realty One argued that the district court lacked jurisdiction to enforce the settlement because its July 14 order had neither

incorporated the terms of the settlement nor included a provision retaining jurisdiction over it. The district court disagreed. Noting that its July 14 dismissal order "expressly reserved the right to make further orders regarding the settlement agreement," the district court held that the order contained "a clear reservation . . . of jurisdiction over matters concerning the settlement agreement," including "the enforcement of the settlement agreement." Pet. App. 46a.

The district court also found that Realty One had breached the settlement recited before the district court by "failing to agree upon" the written terms of the agreement. Pet. App. 46a-48a. To remedy this breach, the district court entered an order setting forth the terms of the agreement, which were drawn from the transcript of the July settlement conference, Realty One's objections to terms proposed by RE/MAX, and terms to which Smythe Cramer agreed. Pet. App. 27a-34a, 49a-66a.

6. When Realty One appealed, the court of appeals affirmed. It found that the district court had jurisdiction to enforce the settlement under this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994). The court of appeals also observed that under *Kokkonen* jurisdiction to enforce a settlement may be retained after dismissal by making compliance with the settlement part of the dismissal order and that *Kokkonen* recognized two ways of doing so: "either by separate provision (*such as a provision 'retaining jurisdiction'* over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." Pet. App. 15a (quoting *Kokkonen*, 511 U.S. at 381) (emphasis in court of appeals opinion). Because the July 14 dismissal order expressly reserved authority to issue "any 'subsequent order[s] setting forth different terms and conditions relative to the settlement and dismissal of the within action,'" Pet. App. 23a, the court of appeals held that jurisdiction over enforcement of the settlement had been retained. A court, it reasoned, "may only enter subsequent

orders involving the settlement agreement if it has retained jurisdiction." *Id.*

In so doing, the court of appeals noted that other circuits had found jurisdiction retained over settlement agreements based on limited reservations of jurisdiction. Pet. App. 19a-20a (citing *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994); *Ford v. Neese*, 119 F.3d 560, 561-62 (7th Cir. 1997); *In re Bond*, 254 F.3d 669 (7th Cir. 2001)). The court also distinguished its prior decisions in *Caudill v. North America Media Corp.*, 200 F.3d 914 (6th Cir. 2000), and *McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001)), on the ground that those decisions dealt with the incorporation of settlement terms into a dismissal order, rather than provisions retaining jurisdiction. Pet. 17a-18a. For similar reasons, the lower court also distinguished the Second Circuit's decision in *Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996), and the Ninth Circuit's decision in *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995). Pet. App. 20a-21a.

Finding that the parties had entered into a valid, binding settlement, the court of appeals affirmed that Realty One had breached the settlement when it "stubbornly refused to cooperate" in negotiating the details of the written agreement. Pet. App. 26a. The court also affirmed the remedy imposed by the district court on the ground that Realty One had "failed to point to any material differences" between the terms of that remedy and the terms of the oral settlement. Pet. App. 27a-34a.

Judge Wallace dissented. Although he did not find that the majority's opinion conflicted with *Scelsa* or any decision of another circuit, he disagreed with the opinion on the merits. While he found that the district court had retained jurisdiction over the settlement, he concluded that the dismissal order retained only "authority to *alter* the terms of the settlement agreement not the authority to *enforce* it." Pet App. 35a

(emphasis in original). In his view, the district court's interpretation of its order was irrelevant because the scope of the reservation was "clear on the face of the order." Pet. App. 35a-36a, 39a.

REASONS FOR DENYING THE WRIT

This case does not warrant further review. The issue upon which Realty One seeks review turns upon application of the Court's decision in *Kokkonen* to a singularly worded dismissal order that indisputably reserved at least some authority over the parties' settlement. As neither *Kokkonen* nor any other case cited by petitioner has construed a similarly worded reservation of authority, the decision below does not create any conflict among the circuits or with this Court's decision in *Kokkonen*. Moreover, the decision below is also correct and, in any event, supported by alternative grounds. As a consequence, this case does not merit the attention of this Court.

1. Although Realty One asserts (Pet. 14) that the decision below conflicts with "[e]very other circuit court which has considered the issue presented here," it fails to cite a single case involving a reservation of jurisdiction similar to the one in the July 14 dismissal order.

The only supposedly conflicting case that Realty One describes is the Second Circuit's decision in *Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996). In that case, however, there was no reservation of authority over settlement. The dismissal order at issue in *Scelsa* simply stated that the case was "dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement among the parties dated January 7, 1994." *Id.* at 39-40. As the decision below recognized, this order "could in no way be construed as expressing an intent to retain jurisdiction." Pet. App. 22a n.13; *accord Scelsa*, 76 F.3d at 41. Thus, although *Scelsa* contains some stray language that petitioners find beneficial, *see Scelsa*, 76 F.3d at 42 (noting

that the trial judge "did not *expressly* state that she had not intended to retain jurisdiction over the Agreement") (emphasis added); *id.* at 41 (noting that the order does not "*expressly* retain [] jurisdiction") (emphasis added), it clearly does not create the sort of square conflict usually required for certiorari. *Cf. Kokkonen*, 511 U.S. at 379 ("It is to the holdings of our cases, rather than their dicta, that we must attend. . . .").

The other cases cited by Realty One (Pet. 14-15) are also easily distinguishable. The dismissal orders in four of the six supposedly conflicting circuit court decisions cited by Realty One do not contain any reservations of authority,[2] and the orders in the two remaining cases reserve authority to reopen the underlying lawsuits, *see Hagestad v. Tragesser*, 49 F.3d 1430, 1432 (9th Cir. 1995); *Morris v. City of Hobart*, 39 F.3d 1105, 1108 n.1 (10th Cir. 1994), an authority distinct from that needed to enforce a settlement. *See Kokkonen*, 511 U.S. at 378. Petitioners' reliance on prior Sixth Circuit precedent (Pet. at 15-17) is similarly misplaced because intra-circuit conflicts are not relevant for purposes of certiorari. In addition, as the decision below recognized, Pet. App. 16a-18a & n.7, those cases are readily distinguishable because the dismissal orders in them simply mention that there was a settlement.[3]

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[2] *See In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 274 (3d Cir. 1999) (simply noting that dismissal was "pursuant to the terms of the Settlement"); *Nat'l Presto Indus., Inc. v. Dazey Corp.* 107 F.3d 1576, 1583 (Fed. Cir. 1997) (not even mentioning settlement); *Miener v. Missouri Dep't of Mental Health*, 62 F.3d, 1126, 1127-28 (8th Cir. 1995) (same); *Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) (order "containing some but not all of the terms of the settlement agreement").

[3] *See McAlpin*, 229 F.3d at 497 (mentioning that "the parties . . . . have settled their dispute" and ordering the file "DISMISSED AS SETTLED WITH PREJUDICE AS TO ALL CLAIMS"); *Caudill*, 200 F.3d at 915 n.1 (dismissing "[p]ursuant to the terms of the parties' October 1, 1991 settlement agreement").

Thus, none of the cases cited by Realty One involves a reservation of authority to modify the terms of a settlement, and therefore they do not even begin to show the sort of square conflict this Court normally requires for certiorari.

2. Realty One's attempt to show a conflict with this Court's decision in *Kokkonen* (Pet. 10-13) fails for similar reasons. *Kokkonen* considered a dismissal order that "did not so much as refer to the settlement agreement." 511 U.S. at 377. Consequently, in *Kokkonen*, the Court had no occasion to consider whether an order retaining authority to alter or amend the terms of a settlement can be construed to retain authority over the enforcement of that settlement. Indeed *Kokkonen* did not even address the type of language or level of specificity required to exercise ancillary jurisdiction over the enforcement of a settlement based upon a provision retaining jurisdiction over the settlement. Thus, there is no conflict between *Kokkonen* and the decision below.

3. Even apart from its failure to show any conflict among the circuits or with this Court, Realty One has not shown that this case presents a question warranting the Court's attention. It has not demonstrated that the question presented is a recurring one; to the contrary, as demonstrated above, Realty One fails to point to a single case with an analogous reservation of authority. Nor has it shown that the question presented is an important one. Realty One argues (Pet. 23-24) that the decision below will discourage settlements because the district court imposed written terms on it. The petition, however, asks this Court to review the lower court's ruling on subject matter jurisdiction, not the remedy that it imposed (which was necessary to prevent Realty One from benefitting from its refusal to honor the settlement it adopted to avoid an imminent trial and thus necessary to maintain confidence in, and respect for, such agreements in the future). Realty One also argues (Pet. 22-23) that this case is important because it concerns limitations on subject matter jurisdiction and the authoritative nature of this Court's decisions. This contention,

however, boils down to nothing more than a claim that the lower court incorrectly applied the principles recognized in *Kokkonen* to the unusual reservation of authority in this case, which is an insufficient basis for certiorari because this Court is not in the business of mere error correction. *See e.g.*, Robert Stern *et al.*, *Supreme Court Practice* § 4.17 at 193 (7th ed. 1993).

4. In any event, the decision below was correct. In its July 14 dismissal order, the district court stated that "[a]ny subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order." Pet. App. 67a. As this order reserves authority to issue subsequent orders altering the terms and conditions of the settlement, it is plainly intended to retain some jurisdiction over the settlement. Moreover, the district court issuing the order found that it was intended to retain jurisdiction "over matters concerning the settlement agreement," including "the enforcement of the settlement agreement." Pet. App. 46a. This finding deserves deference because, as petitioner's own authority recognizes, the district court is "in the best position to determine whether it intended to retain jurisdiction over enforcement of the settlement." *In re Phar-Mor*, 172 F.3d at 275; *see also Scelsa*, 76 F.3d at 42 ("[T]here are few persons in a better position to understand the meaning of an order of dismissal than the district judge who ordered it."). Indeed, as the court of appeals observed, the district court could "only enter subsequent orders involving the settlement agreement if it has retained jurisdiction." Pet. App. 23a. Thus, the district court's construction of its July 14 dismissal order should be respected.

In arguing to the contrary, Realty One does not point out any flaws in the district court's construction of its order or the court of appeals' reasoning. Indeed, notably absent from the petition and from Realty One's briefs in the court of appeals below is any attempt to offer an alternative reading of the dismissal order. Realty One argues (Pet. 19-22) that a district

court cannot exercise jurisdiction over the enforcement of a settlement agreement if there is any ambiguity or uncertainty in the reservation of jurisdiction. A clear statement rule is, however, strong medicine, *see, e.g.*, *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), and Realty One does not even begin to show that such a rule is appropriate here. Realty One claims (Pet. 19) to derive this requirement from *Kokkonen*, which is plainly incorrect because, as noted above, *Kokkonen* did not have occasion to consider the issue. *See supra* p. 9. Indeed, the clear statement rule is incompatible with *Kokkonen*'s observation that a court may make compliance with a settlement agreement part of a dismissal order implicitly by "retaining jurisdiction" over the order. *See Kokkonen*, 511 U.S. at 381. Thus, Realty One's position has no basis.

Nor is Realty One saved by the dissent's conclusion that the July 14 dismissal order reserved authority to alter the terms of the settlement but not to enforce it. *See* Pet. App. 35a. In the first place, Realty One has not adopted this interpretation; to the contrary, Realty One claims (Pet. 21) the reservation is "ambiguous." In addition, under the dissent's interpretation, the reservation in the July 14 dismissal order would still authorize the enforcement order issued by the district court.

By its terms, the enforcement order falls squarely within the scope of the July 14 dismissal order's reservation because it sets forth "terms and conditions relative to the settlement." Pet. App. 67a. Even more fundamentally, in retaining authority to issue orders altering the terms of the settlement, the July 14 dismissal order reserved the ability to incorporate into a later order the terms and conditions developed in the process of memorializing the settlement. By refusing to participate in that process, Realty One undermined the district court's ability to exercise that authority, thereby invoking the district court's ancillary jurisdiction to "manage its proceedings [and] vindicate its authority." *Kokkonen*, 511 U.S. at 380. Thus, even under the dissent's narrow construction,

the July 14 dismissal order afforded the district court jurisdiction over the particular breach of contract considered below.

5. This case is a poor vehicle for considering the question presented because Realty One's petition makes a concession that moots that question.

As Realty One points out (Pet. App. 79a), RE/MAX argued in the lower court that the July 14 dismissal order should be treated as an administrative closing because the district court lacked authority to dismiss the case unconditionally under Federal Rule of Civil Procedure 41(a)(2), which authorizes courts to order the dismissal of a case "at the plaintiff's instance." Fed. R. Civ. P. 41(a)(2). Although the court of appeals found that the dismissal was pursuant to that Rule, Pet. App. 8a, Realty One now concedes (Pet. 21) that there was "no motion in the record by the plaintiffs as required by Rule 41(a)(2)" and that therefore there was no dismissal under Rule 41(a)(2).

Although Realty One asserts (Pet. 21) that dismissal was nonetheless appropriate under Rule 41(a)(1), that is incorrect. Rule 41(a)(1) permits a plaintiff to dismiss a case after the filing of an answer only "by filing a stipulation of dismissal signed by all parties who have appeared in the action." Fed. R. Civ. P. 41(a)(1). Realty One does not—and cannot—point to any such stipulation; instead, it incorrectly argues (Pet. 21) that the settlement read into the record on July 13 effected the required stipulation. In addition, even if an oral settlement could act as a stipulation under Rule 41(a)(1), the settlement here would not have authorized the district court to dismiss the case on July 14 because that settlement was not to go into effect until 45 days later while the parties worked out the details of a written agreement. Pet. App. 72a-73a. As a consequence, the order issued by the district court on July 14 could only have effected an administrative closing, not a dismissal under Rule 41 depriving the district court of subject

matter jurisdiction over enforcement of the settlement. Thus, this case does not even squarely present the question whether the reservation in that order retained jurisdiction to enforce the settlement.

* * *

In sum, this case does not merit this Court's attention because the Sixth Circuit's decision below does not conflict with either the decisions of this Court or the decisions of other courts of appeals. Indeed, Realty One has failed to cite a single case involving an analogous reservation of authority. As the decision below also correctly applied this Court's decision in *Kokkonen* to the unusual reservation before it and is justifiable on independent grounds as well, no further review is warranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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173 F.3d 995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

RE/MAX INTERNATIONAL, INC.; A.E.B.T.S., Inc., d/b/a Re/Max Crossroads Properties; T.M.A.T.N.B., Inc., d/b/a Re/Max Affinity, Inc.; D.F.I., Inc., d/b/a Re/Max Results; Joseph P. Grady, Inc., d/b/a Re/Max Xpress; McGrew Realty, Inc., d/b/a Re/Max Key Realty; Property Professionals, Inc., d/b/a Re/Max Property Professionals, Plaintiffs-Appellants/Cross-Appellees, Re/Max Northeast Ohio Limited Partnership; Zames Realty, Inc.; Realty Properties, Inc.; True Independence Partnership; R.E.P., Inc., Intervenors-Appellants/Cross-Appellees,

v.

REALTY ONE, INC. (96-3362/3469); Smythe Cramer Company (96-3362/3470), Defendants-Appellees/Cross-Appellants.

Nos. 96-3362, 96-3469 and 96-3470.

Argued Oct. 30, 1997.
Decided April 6, 1999.

Before: RYAN and BATCHELDER, Circuit Judges; CAMPBELL, District Judge.*

RYAN, Circuit Judge.

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* The Honorable Todd J. Campbell, United States District Judge for the Middle District of Tennessee, sitting by designation.

This is an antitrust case involving northeast Ohio real-estate brokers. Plaintiffs accuse the defendants, and one of the defendants accuses the plaintiffs, of engaging in illegal business practices designed to drive the other out of business, in violation of state and federal antitrust laws. Following extensive pretrial motion activity, and in the course of four written opinions comprising some 400 pages of discussion, the district court entered judgments dismissing all of the plaintiffs' claims on summary judgment, and all but one of defendant Realty One Inc.'s counterclaims, either on summary judgment or for failure to state a claim.

Plaintiffs and intervenors, whom we shall call plaintiffs or Re/Max, appeal from the entry of summary judgment against them on their state and federal antitrust claims. Defendant Realty One cross-appeals from the Fed. R. Civ. P. 12(b)(6) dismissal of its complaint for failure to state a claim on some of its counterclaims and from the Fed. R. Civ. P. 56 entry of summary judgment on others.

We hold that, although the district court engaged in an exhaustive review of the merits of the claims in this case, it erred in disregarding important aspects of the evidence presented by the plaintiffs' expert witness, and in rejecting evidence that the defendants had the ability to exclude competition from the marketplace. We conclude that there is sufficient evidence to create a justiciable issue whether the defendants violated §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 & 2, and, therefore, summary judgment should not have been entered against the plaintiffs.

Finally, we hold that Realty One's counterclaims are not legally supportable and thus were properly dismissed.

I. BACKGROUND

A. The Nature of the Controversy

To provide a contextual framework for our discussion of the merits of this difficult case, we first begin with a few observations concerning the unique nature of antitrust law, and then proceed to a description of the doctrinal predicates that underlie the parties' claims.

Unlike the assumption that informs most areas of tort and contract law, in the marketplace certain "harms" are not only accepted, they are encouraged. Fundamental canons of antitrust law recognize the legitimacy of permitting the natural economic forces of free enterprise to drive inefficient producers of goods and services out of the market, and replace them with efficient producers. Ordinarily, when an efficient enterprise displaces an inefficient one, we conclude that consumers' economic interests are better served, despite that the inefficient enterprise is injured or even destroyed. Conversely, when inefficiency triumphs over efficiency, consumers lose because they receive lower-quality, higher-priced products and services.

Manifestly, the judiciary is ill-suited to evaluate directly the efficiency of business practices. But antitrust doctrine provides a methodology for courts to distinguish between instances of efficiency displacing inefficiency, which is not, *per se,* an economic harm and for which the law offers no redress, and inefficiency displacing efficiency, which, if achieved by the use of unfair means, the law seeks to prevent or rectify. In general, then, antitrust law seeks to identify situations in which enterprise organizations rely on sheer economic power to drive out an innovative but less powerful rival, *rather than* attempting to do so by improving the quality or lowering the cost of their products or services.

At the heart of the disagreement between the parties to this lawsuit are disputes about (1) who is economically dominant

and (2) who employs the best formula for compensating real-estate sales agents for their services. Because it is conducive to more easily understanding the nature of the two-pronged dispute between the parties, we begin by addressing the second aspect first—who employs the more efficient formula for compensating sales agents.

As most home buyers are aware, ordinarily, a real-estate agent who lists a house for sale agrees to represent the homeowner/seller, doing so for a fixed fee, called a "commission," that is a percentage of the selling price. If another real-estate agent, working for a different broker, brings a purchaser to the deal, the two agents usually split the commission 50/50. If, for example, the sales commission on the listing is 7% of the sales price, the listing agent splits the 7% commission 50/50 with the agent who produced the buyer. Then, ordinarily, although there can be different arrangements, each sales agent must split his or her 3-1/2% commission 50/50 with the broker with which he is affiliated. To continue the example, if a house sells for $200,000 and the sales commission is 7%, or $14,000, the listing agent receives $7,000, and the agent representing the buyer receives $7,000. Then, under the traditional practice, each agent pays one half, or $3,500, to the broker with which he is affiliated. But Re/Max agencies, throughout the Re/Max nationwide franchise system, compensate their sales agents very differently.

Under its system, Re/Max requires that its franchisees adopt the "Re/Max 100% Concept" which allows real-estate sales agents to receive 95% to 100% of their share of sales commissions, instead of the traditional practice of splitting commissions 50/50 with the salesperson's broker/employer. So, as in the foregoing example, if either the listing agent or the agent producing the buyer is a Re/Max sales agent, his commission, rather than being one half of 3-/2% of the sales price, or $3,500, is the full 100% of the partial commission, or $7,000. In return, Re/Max agents pay the broker/employer a

flat monthly fee for desk space, telephone services, secretarial support, and the like. Re/Max contends that the 100% Concept attracts more experienced, more knowledgeable—and this is important—more efficient agents. Indeed, Re/Max recruits and hires only experienced agents, on the theory that novices could not survive without a guaranteed minimum income if commissions were not immediately forthcoming—and ordinarily they are not—when inexperienced agents are "in training" and learning the business.

We now return to the first part of plaintiffs' two-pronged antitrust argument—that defendants are economically dominant in the real-estate market or markets in question.

Re/Max contends that defendants Realty One, Inc. and Smythe Cramer Company have dominance in the northeast Ohio real-estate markets and have used that dominance to defeat Re/Max's attempt to introduce its unique and, it claims, more-efficient sales-agent compensation system. Re/Max argues that the defendants control the northeast Ohio markets in two ways: (1) by obtaining the listings for a large majority of homes for sale and (2) by attracting and employing the large majority of experienced real-estate agents. There is nothing, of course, illegal in that. What is illegal, according to Re/Max, is the means it claims the defendants have employed to perpetuate that dominance—the defendants' so-called "adverse splits" policy, which we shall explain in due course. According to Re/Max, the real and intended effect of this policy is that the defendants essentially refuse to sell homes to customers brought to them by Re/Max agents. In consequence, Re/Max argues, it cannot attract experienced agents for its sales force, because, given Realty One's policy of boycotting purchasers produced by Re/Max, experienced agents would not make enough money working for Re/Max. Without experienced agents, Re/Max argues, it is prevented from entering the northeast Ohio real-estate market.

Realty One, on the other hand (but not Smythe Cramer), counterclaims that *Re/Max* is attempting to become, through unfair competition, the dominant player in the northeast Ohio real-estate markets. It argues that Re/Max, with its national network of franchisees, is purposely operating at a loss in northeast Ohio by offering greater compensation to experienced agents than it can afford or the market can bear—a sort of predatory pricing—in order to capture the market in experienced agents and thereby establish a real-estate monopoly in northeast Ohio.

Not surprisingly, each party avers that its brokerage system is most efficient. Re/Max maintains that the economies of scale of which it takes advantage in advertising, support services, and the like, and its ability to attract more-experienced agents by paying them 95% to 100% of their sales commissions (the 100% Concept), result in better services to home buyers and sellers.

Realty One and Smythe Cramer claim the Re/Max system is less efficient than theirs in two ways. First, Re/Max has at least three levels of administration: the national franchisor, the regional subfranchisor, and the local franchise. Realty One and Smythe Cramer, on the other hand, are locally based and operated. Second, the "Re/Max 100% Concept" inhibits the recruitment and training of new agents and drives up costs in the labor market. That is, Re/Max makes no investments in agent training, preferring the short-term gain realized by hiring experienced and already successful agents. According to the defendants, customers are ill-served by this practice in the long run because no new agents are ever trained, and experienced agents eventually require more and more compensation as brokerage services become more and more scarce. Conversely, the defendants maintain, they invest substantially in training new agents.

Having set out in general terms the economic context for the disputes in this case, we turn now to a closer look at the

parties themselves and the factual and legal bases for their respective claims.

First of all, it must be understood that the plaintiffs accuse the defendants, and defendant Realty One accuses the plaintiffs, *inter alia,* of violating both §§ 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. Section one, in relevant part, states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2, in relevant part, states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

B. The Parties

Plaintiff Re/Max International, Inc. is a franchisor of a real-estate brokerage system that it sells to franchisees across the nation, including northeast Ohio. Intervenor Re/Max Northeast Ohio Limited Partnership is the Re/Max subfranchisor for the northeast Ohio region, an area consisting

of Cleveland and the surrounding metroplex. The remaining plaintiffs and intervenors are all franchises located in northeast Ohio, operating in some 14 communities.

Realty One and Smythe Cramer are the largest real-estate brokerages in northeast Ohio in terms of market share. Realty One appears to have 40 offices in northeast Ohio, and Smythe Cramer, 34. The reader interested in knowing the particular communities in which each brokerage operates, at least according to the record of trial, may wish to consult the addendum at the end of this opinion.

1. The Plaintiffs' Claims

During discovery, plaintiffs obtained the deposition of an expert witness, Dr. Donald L. Martin, whose testimony presents an important issue in this appeal, as we shall discuss in due course. In a portion of his testimony that is essentially unchallenged, Dr. Martin presented statistical data as follows:

In a majority of the 161 cities and towns in northeast Ohio, the defendants' combined market share exceeds 50%. That is, in 85 out of 161 communities, the defendants earn more than half of all the brokerage fees generated from residential home sales. In all but seven of these cities and towns, the defendants' combined market share is more than 20%. Realty One alone has at least a 40% market share in 37 political subdivisions; Smythe Cramer, more than 40% in 23. Also, according to the plaintiffs' expert, this large market share, with a corresponding lack of significant market share by the next largest competitor, results in Realty One's control of the market in 26 communities, and Smythe Cramer's, in 19. In nine of the cities and towns in which Re/Max has offices, the defendants enjoy the following *combined* market share: Rocky River (78.5%), Aurora (75.6%), Westlake (68.2%), Hudson (67.2%), Concord Township (64%), Strongsville (60.6%), Broadview Heights (55.7%), Mentor (54.1%), and Painesville (49%). The plaintiffs' expert apparently did not analyze the defendants' market share in Akron, Bay Village,

Canton, Dover, and North Canton, the other five northeast Ohio towns in which Re/Max has offices.

We have said that Re/Max claims, *inter alia,* that it is the *means* the defendants have chosen to dominate the relevant market for hiring real-estate sales agents—their "adverse splits" policy—which violates state and federal antitrust laws. That is, beginning in 1987, the defendants implemented the adverse-splits policy against all Re/Max agents. Although, as we have explained, the standard practice in the industry is that commissions are split equally when one brokerage brings the seller and another brokerage brings the buyer to a transaction, in 1987 Realty One and Smythe Cramer began notifying Re/Max brokerages that the split would be 70/30 or 75/25, in favor of the defendants, whenever a Re/Max agent was on the other side of the table from a Realty One or Smythe Cramer agent. It is undisputed that the policy was designed to deter defections of sales agents from the defendants' employment to the plaintiffs'.

The plaintiffs allege that neither of the defendants imposed the adverse-splits policy independently, but rather made an agreement to do so, thereby violating § 1 of the Sherman Act, which prohibits any combination or conspiracy that unreasonably restrains trade. We will address the specific provisions of the Sherman Act more fully, in due course. The plaintiffs also allege that in the communities in which one or the other defendant by itself controls the market for experienced real-estate agents, each defendant, through the implementation of this adverse-splits policy, has used its power to effectively discourage experienced real-estate sales agents from working for Re/Max. The goal, which indeed has been achieved, according to plaintiffs, is to drive Re/Max franchises out of business, or to prevent Re/Max franchises from establishing themselves in the first place, thereby creating an illegal monopoly in violation of § 2 of the Sherman Act.

In simplified terms, then, the plaintiffs' claim is that the defendants control the market for knowledgeable and experienced sales agents who have developed an expertise in certain communities in northeast Ohio, and, through the unfair adverse-splits policy, have prevented Re/Max from recruiting those agents, thereby depriving Re/Max franchises of the information and expertise they need to effectively serve buyers and sellers of homes. Instead of competing with Re/Max in the experienced-agent market by raising the compensation of their own experienced agents, as Re/Max has, the defendants have tried to drive Re/Max out of northeast Ohio by imposing the adverse splits, which do not allow Re/Max agents, and thus Re/Max franchises, to do business profitably. The plaintiffs maintain that the adverse-splits *conspiracy* constitutes a boycott or refusal to deal, is *per se* illegal under § 1 of the Sherman Act, and does not require proof that trade is unreasonably restrained. They also argue that, in those areas where one defendant has a *monopoly,* the adverse-splits policy has been implemented in order to increase or maintain the defendant's market power in that particular area in violation of § 2 of the Act.

The district court entered summary judgment for the defendants on the plaintiffs' § 1 conspiracy claims, finding that no conspiracy had been proved. It dismissed the plaintiffs' § 2 claims, finding that the plaintiffs failed to define the relevant markets in which the defendants allegedly exercised monopoly power and, in any event, failed to prove monopoly power was exercised.

The plaintiffs point to numerous facts in the evidence that they contend demonstrate that Realty One and Smythe Cramer *conspired* to set the adverse-splits commission rates. First, Leo Lee, a former Realty One employee, testified that the CEO of Realty One, Vince Aveni, admitted that he and Smythe Cramer's principal shareholder, L.B. McKelvey, agreed to impose the adverse-splits policy. Second, the plaintiffs' expert, Dr. Martin, opined that *independent*

imposition of adverse commission splits would be economically irrational for either defendant, even after one defendant had already adopted the policy. Third, the plaintiffs claim that the defendants offered merely pretextual explanations for their conduct, explanations that clearly cannot be believed. That is, the adverse-splits policy cannot be an attempt by the defendants to protect their training investments in their agents, because inexperienced real-estate agents essentially "pay" for their own training because they realize relatively few sales early in their careers. Also, despite the defendants' statements to the contrary, each defendant must at least have considered what the other would do in response to its claimed independent adoption of the adverse-splits policy. Fourth, the leaders of Realty One and Smythe Cramer were once business associates, and in 1987 had the opportunity to meet and work out an adverse-splits agreement. And fifth, the adverse splits were imposed against the various Re/Max franchises by the defendants almost simultaneously. In fact, the record indicates that Realty One imposed a 30% split and Smythe Cramer a 25% split on the following Re/Max franchises on the following dates:

Date	Issuing Defendant	Re/Max Broker
1.22.90	Smythe Cramer	Re/Max Reality
1.31.90	Realty One	Re/Max Reality
5.30.91	Smythe Cramer	Re/Max Specialists
7.10.91	Realty One	Re/Max Realty Properties
11.13.91	Smythe Cramer	Re/Max Realty Properties
5.27.92	Smythe Cramer	Re/Max Xpress
7.17.92	Realty One	Re/Max Xpress
2.15.93	Realty One	Re/Max Results
2.17.93	Smythe Cramer	Re/Max Results
3.2.93	Smythe Cramer	Re/Max Affinity
4.8.93	Realty One	Re/Max Affinity
11.12.93	Smythe Cramer	Re/Max Crossroads
1.4.94	Realty One	Re/Max Crossroads
4.20.94	Smythe Cramer	Re/Max Partners

5.12.94	Realty One	Re/Max Partners
8.16.94	Smythe Cramer	Re/Max Experts
12.19.94	Smythe Cramer	Re/Max Premier Service

It appears that the remaining plaintiffs received notice of the adverse-splits policy before 1990, although the record is unclear as to the exact dates.

Similarly, according to the plaintiffs, Realty One and Smythe Cramer have market power in the cities and towns where one defendant has at least a 40% market share, and no other competitor is close to having 40%. Thus, Realty One purportedly has monopoly power in 26 cities and towns; Smythe Cramer, in 19. The plaintiffs claim that each city and town in northeast Ohio is its own market, because, unlike such products as automobiles or video equipment that can be sold anywhere, the expertise possessed by real-estate agents is specific to small geographic areas. Each agent trades in his "knowledge of the physical characteristics of the stock of locally listed housing, of the socio-economic characteristics of the population of local homeowners and of the nature of local community amenities (e.g., schools, churches, police security, etc.) together with other relevant details." The defendants advertise and seek market share by reference to particular cities and towns, and the listing services in northeast Ohio list homes for sale by political subdivision. According to plaintiffs, in light of the intensely local nature of the residential real-estate business and the fact that brokerages use political boundaries for other purposes, individual cities and towns must each comprise a separate marketplace in the market for real-estate services. The plaintiffs claim that Realty One and Smythe Cramer each have a monopoly on experienced agents in certain cities and towns, and on the supply of persons with homes for sale, and that the defendants have used these monopolies to keep their agents from accepting better-paid positions with Re/Max affiliates by imposing adverse commission splits. That is, they refuse to sell listed homes—except on terms that are not profitable for

the Re/Max agent—to buyers brought by Re/Max agents, including, of course, any former agent of the defendants who has defected to Re/Max.

2. The Defendants' Response

Realty One and Smythe Cramer deny conspiring or exercising monopoly power to impose adverse commission splits. Each defendant maintains that it *independently* decided to use adverse commission splits to fight a competitor who was trying to lure away its most successful agents and deprive it of a return on its investment in the training of its agents. The defendants claim that as a matter of economic self-defense they decided to cut the amount of commission paid to Re/Max agents, with the result that agents who defected to Re/Max and received *all* of a 25% or 30% commission would earn approximately the same in the end as agents who stayed at Realty One or Smythe Cramer and received half of the 50% commission that, under the traditional compensation formula, is split with the broker.

C. Defendant Realty One's Counterclaims

Realty One has asserted in various counterclaims that the plaintiffs violated §§ 1 and 2 of the Sherman Act and state antitrust law (1) by agreeing to set the level of compensation that Re/Max brokers would pay to other brokers in cooperative transactions, (2) by agreeing not to recruit each other's agents, (3) by recruiting Realty One's agents with the deceptive promise of higher compensation, (4) by disparaging Realty One to its customers and to the general public, (5) by interfering with the contractual relationships between Realty One and its customers, and (6) by engaging in sham litigation for the sole purpose of hindering Realty One's operations. Realty One also alleged violations of Ohio law relating to (7) interference with business relationships and (8) unfair competition.

D. The District Court's Pretrial Rulings

1. The Court's May 10, 1995 Opinion

On May 10, 1995, the district court entered an order dismissing three of Realty One's eight counterclaims. It reasoned as follows: First, Realty One did not have standing to pursue its claim that Re/Max franchisees illegally agreed not to recruit each other's agents ((2) above). In its claim, Realty One alleged no antitrust harm; in fact, it *benefitted* by the reduction in competition for remaining agents. Even if there were a harm to the market associated with this practice, it is primarily sales agents who would be harmed, and they would be the proper parties to bring suit, not Realty One.

Second, Realty One alleged no antitrust injury in its claim that Re/Max engaged in deceptive recruitment techniques ((3) above). The mere allegation that Re/Max bid more for Realty One's agents could not constitute an antitrust violation.

Third, Realty One did not state a valid claim in arguing under *§ 2* of the Sherman Act that the Re/Max franchises conspired to set commission splits with non-Re/Max brokerages ((1) above), because Realty One alleged no specific intent on the part of Re/Max to monopolize. Realty One's allegations, even if true, evidenced no more than Re/Max's intent to expand into northern Ohio at Realty One's expense. Additionally, Realty One failed to make sufficient allegations that Re/Max's alleged vertical commission-setting agreements between the franchisor and the franchisees violated *§ 1*, and thus the district court did not consider Realty One's conclusory amended complaint in that regard. However, the court *did find* that Realty One stated a valid *§ 1* claim that the franchises had conspired horizontally to set the commissions they pay to non-Re/Max brokerages in cooperative transactions.

Fourth, the court dismissed Realty One's antitrust disparagement claim ((4) above), because "[m]ere allegations

of business disparagement are not the type of injuries to competition that the antitrust laws were designed to prevent."

Fifth, the court found that Realty One had stated a valid claim that the plaintiffs conspired to conduct sham litigation against Realty One in violation of § 1 of the Sherman Act ((6) above). Sixth, Realty One's state-law counterclaims contained allegations sufficient to survive a 12(b)(6) motion ((7) & (8) above).

Finally, regarding Re/Max's complaint, the district court discussed Re/Max International's, the franchisor's, standing to bring its antitrust claims. The court found that Re/Max International was indeed injured by the defendants' alleged anticompetitive conduct and was the proper party to assert the claim that the defendants were exercising monopoly power in the market for experienced real-estate agents. However, Re/Max International was *not* the proper party to prosecute the claim regarding the defendants' monopoly in the home-buying and selling market. Re/Max could not prosecute the *brokerage-services* claim because, as we shall discuss below, of the five factors enumerated by this court to be evaluated in determining antitrust standing, two weighed heavily against Re/Max International, one was neutral, and two weighed for the plaintiffs. On the other hand, the factors heavily favored standing on the *competition-for-agents* claim.

2. The Court's September 11, 1995 Opinion

On September 11, 1995, the district court denied another motion by Realty One asking for summary judgment. This time, the defendant claimed that issues decided in *Re/Max International, Inc. v. Donald Greif,* No. 90-0166 (N.D.Ohio Mar. 14, 1990), precluded Re/Max from arguing for a different result in the present case. For reasons not important to this appeal, the district court denied Realty One's motion. Realty One has abandoned any issue-preclusion assignment of error by failing to discuss it on appeal.

3. The Court's September 18, 1995 Opinion

Next, on September 18, the district court considered another round of the defendants' motions for summary judgment. This time, Realty One and Smythe-Cramer contended that the four-year statute of limitations had run against many of the plaintiffs' claims, because the first act of the alleged conspiracy occurred in 1987. However, the district court found a genuine factual dispute whether the defendants had engaged in overt acts of conspiracy within the four years preceding January 1994, when the original complaint was filed. Specifically, the court noted record evidence tending to show that the defendants had instituted adverse commission splits against most of the plaintiffs *after* January 1990, and that the defendants thereafter engaged in other acts such as disparagement of the plaintiffs and disruption of the plaintiffs' efforts to show and sell homes listed by the defendants. Additionally, the plaintiffs' monopolization claims under § 2 had not expired, because the defendants acquired competitors in markets in which they allegedly had monopoly power, thereby injuring the plaintiffs within the limitations period.

Finally, the district court held that even if the four-year limitations period would have otherwise expired, evidence that the defendants fraudulently concealed their illegal activities equitably tolled the running of the statute. The plaintiffs had introduced evidence that one or both of the defendants had (1) denied their collusion, (2) instructed employees not to discuss the adverse splits, (3) obscured their targeting of Re/Max by putting other companies on their adverse-splits list, (4) failed to keep records of meetings during which the decisions regarding adverse splits were made, and (5) altered documents submitted to the Federal Trade Commission pursuant to the agency's investigation of the adverse-splits policy. The court found that this concealment prevented the plaintiffs from discovering, with due diligence, evidence that the defendants had conspired to adopt the adverse-splits policy.

4. The Court's March 19, 1996 Opinion

On March 19, 1996, the district court granted summary judgment dismissing all of the plaintiffs' remaining claims, and four of Realty One's five remaining counterclaims.

The plaintiffs' § 2 monopolization claims were dismissed because the plaintiffs failed to meet their burden of defining the relevant geographic markets in which the defendants were alleged to wield monopoly power; nor had Re/Max met its burden of showing that the defendants had the power to set prices or exclude competition in the geographic markets plaintiffs claimed. First, the court rejected the plaintiffs' claim that each of 161 cities and towns in northeast Ohio was its own geographic market for real-estate agents and for brokerage services. The plaintiffs had introduced no evidence that home buyers or sellers obtain real-estate brokerage services exclusively or even largely from brokers within their own political subdivisions. Similarly, no evidence indicated that brokers did not cross political boundaries to show homes, or that brokerages did not cross such boundaries to recruit agents.

Moreover, the district court held, even if the 161 areas were geographic markets, the plaintiffs' expert, Dr. Martin, relied on "questionable" data in reaching his conclusions that the defendants exercised monopoly power. In calculating market share, the expert looked only at the dollar value of homes sold, rather than the number of homes. He reviewed data from 1993 through 1995 only, although the plaintiffs' suit sought damages back to 1987. And, in his analysis, the expert may have overlooked up to 40% of all homes sold. Thus, the plaintiffs' expert's report did not sufficiently support the § 2 monopolization claims.

Second, even if the expert's conclusions were accepted, the plaintiffs had not met their "stiff burden" to establish monopolization, conspiracy to monopolize, or attempted monopolization. Particularly telling was the relatively low

market share that the plaintiffs contended Realty One and Smythe Cramer had in the relevant localities—in no case was it above 51%. Although there is no minimum market share required to make out a § 2 claim, the court thought that failing to meet a 50-60% threshold defeats a claim unless evidence is proffered showing, for instance, that a defendant's market share increased after initiating the anticompetitive activity or that there were true entry barriers to the relevant industry. Similarly, the attempted monopolization claims failed because there was no evidence that there was a dangerous probability that defendants would succeed in achieving monopolization—their market share had not grown since 1987, and new firms could enter the market easily to undercut monopolistic prices or policies. Likewise, the conspiracy-to-monopolize claims failed because the plaintiffs had offered no evidence of the defendants' specific intent to establish a monopoly.

The defendants were granted summary judgment on the plaintiffs' § 1 conspiracy claims, because there was insufficient evidence that the defendants *mutually agreed* to adopt adverse splits, rather than imposing them independently. The court recognized that a claim of conspiracy to fix prices need not include proof that the activity unreasonably restrains trade and that such an agreement if proven would be a *per se* violation of § 1 of the Sherman Act. However, in ruling against the plaintiffs, the court found that all of their proofs were equally consistent with independent action.

Most important to the court's analysis in this regard was its rejection of the findings of the plaintiffs' economic expert, Dr. Martin. Although the witness stated in his written report that unilateral imposition of adverse splits would be economically irrational, the district court held that Dr. Martin "implicitly" admitted in his deposition that independent adverse splits could have been in Smythe Cramer's (and thus Realty One's) best interest; that is, had Smythe Cramer not imposed the adverse splits, it would have lost agents to Re/Max or been forced to pay higher salaries. Although the

court cited this economic benefit to the defendants of imposing the adverse-splits policy, notably, the court did not consider whether the plaintiffs' expert had admitted, implicitly or otherwise, that this benefit exceeded the *costs* of the policy in terms of lost business. Also, according to the court, the facts that the defendants imposed roughly the same splits at roughly the same times, that they exchanged information regarding their splits against Re/Max, and that they had opportunities to meet, could all be explained innocently.

Moreover, the court ruled that the testimony of Leo Lee—to the effect that Realty One's CEO admitted conspiring with Smythe Cramer to impose the adverse splits—was inadmissible. The court found the conversation between Lee and Realty One's CEO to be inadmissible hearsay, and not within the requirements of the coconspirator exclusion of Fed. R. Evid. 801(d)(2)(E), because there was insufficient evidence of a conspiracy and because the statement could not be construed as being "in furtherance of" the conspiracy even if one existed. The court apparently did not consider whether the statement was admissible against Realty One simply as an admission of a party opponent. Fed. R. Evid. 801(d)(2)(D).

The court also dismissed the plaintiffs' state-law claims for reasons that are not relevant here, as the plaintiffs have not appealed this aspect of the district court's judgment.

As for Realty One's remaining counterclaims, all were dismissed as unsupported by the evidence, save only the claim that the plaintiffs had engaged in sham litigation in violation of § 1. Although the court found evidence that Re/Max franchises had agreed to set broker-to-broker commission splits for non-Re/Max brokers, the court held that Realty One had not alleged a resulting injury to its business or property and thus had not stated a valid claim on that count. Realty One's tortious interference and unfair-competition claims—that the plaintiffs interfered with contractual relationships between Realty One and its agents and between

Realty One and its customers listing homes for sale—were also dismissed. Re/Max could not illegally induce an at-will employee from leaving his position with Realty One, and Realty One had adduced no evidence of any customer contract with which any plaintiff had interfered. Lastly, Realty One's claim that the plaintiffs engaged in unfair competition by stealing lists of Realty One's agents failed, because there was no evidence that Ohio regards a list of brokers as a "trade secret."

Because the central claims in the case had been dismissed, and because proceeding to trial on the sham-litigation claim would result in undue delay of the appeals from the several judgments as matters of law, the district court entered final judgment under Fed. R. Civ. P. 54(b). This timely appeal followed.

II. STANDARD OF REVIEW

We review for abuse of discretion the district court's judgments of dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and *de novo,* its dismissal of claims on summary judgment under Fed. R. Civ. P. 56.

III. DISCUSSION

A. Plaintiffs' § 1 Conspiracy Claims

As we have said, § 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, prohibits any "contract, combination . . ., or conspiracy" between two or more persons that unreasonably restrains trade in interstate commerce. *See Standard Oil Co. v. United States,* 221 U.S. 1 (1911). Absent sufficient evidence that Realty One and Smythe Cramer *agreed* to adopt the adverse-splits policy, § 1 of the Sherman Act is not implicated. *See Nurse Midwifery Assocs. v. Hibbett,* 918 F.2d 605, 611 (6th Cir. 1990). We turn, therefore, to a discussion of the evidence adduced regarding the defendants' alleged conspiracy.

1. Evidence of Conspiracy Between the Defendants

As in other areas of law, a conspiracy may be demonstrated by direct or circumstantial evidence. However, circumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. In such a case, the evidence of conspiracy would not preponderate. *See Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990). In other words, circumstantial evidence must tend to exclude the possibility of independent conduct in order that an antitrust claim survive summary judgment. Important factors to evaluate in this analysis include: (1) whether the defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire. *See Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995). Ordinarily, an affirmative answer to the first of these factors will consistently tend to exclude the likelihood of independent conduct.

We are satisfied that the district court erred in finding that the plaintiffs had not adduced evidence of the defendants' alleged conspiracy, sufficient to resist summary judgment. Certainly, much of the plaintiffs' evidence is as consistent with independent conduct as with a conspiracy. The facts that the defendants had opportunities to conspire, that they imposed adverse splits at almost the same times and in almost the same manner, and that their principals had preexisting business relationships are all probably equally consistent with unilateral action. Arguably, *without more*, these facts would be insufficient to support an inference of a conspiracy. However, there is more. These facts are strongly bolstered by the additional circumstantial evidence that the adverse-splits policy would not have been in either defendant's *independent*

economic interest, and by the statement of witness Lee that Realty One's CEO admitted entering into an agreement with Smythe Cramer. This additional evidence, taken together with the other circumstantial evidence of conspiratorial conduct, would entitle a reasonable jury to conclude that Realty One and Smythe Cramer conspired to adopt adverse commission splits against Re/Max.

First and foremost, Dr. Martin's deposition and report establish a genuine issue of material fact whether unilateral imposition of adverse splits would have been economically rational for the defendants. The district court found that Dr. Martin had admitted in his deposition that the adverse-splits policy may have been in Smythe Cramer's best interest. However, we think this finding mischaracterizes Dr. Martin's testimony, and disregards the clear import of his report. What Dr. Martin acknowledged in his deposition is that Re/Max would have been more successful in recruiting Smythe Cramer's agents if the latter had not imposed adverse splits. However, that statement does not address the *costs* to Smythe Cramer of the adverse-splits policy. Dr. Martin testified that if Smythe Cramer had no assurance that Realty One would also adhere to adverse splits against Re/Max, the danger of unilateral imposition would have *outweighed* the potential loss of agents.

For example, a unilateral-splits policy against Re/Max adopted only by Smythe Cramer would keep Smythe Cramer's agents from leaving for *Re/Max,* but it would result in customers and sales agents leaving for *Realty One.* Dr. Martin clearly stated in different ways on a number of occasions that "without coordinated conduct, parallel imposition of adverse splits is implausible." He explained that, in a market with two dominant competitors, the risk of loss of sales agents to a third entrant offering more favorable employment terms is outweighed by the risk of loss of market share if a dominant competitor imposes adverse splits on the new market entrant. For example, one of two dominant competitors (Smythe

Cramer) acting rationally will not independently impose adverse splits on a new competitor (Re/Max), because doing so will cause the new competitor to concentrate on supplying buyers to purchase properties listed by the other dominant competitor (Realty One). Thus, the dominant competitor who does not impose the adverse splits will sell more homes faster, while the other dominant competitor will lose agents and referral business in a downward cycle.

Furthermore, the best of both worlds for *either* dominant competitor is for the *other* to impose the adverse splits against the new entrant. In that situation, the non-imposing competitor obtains a "very high" increase in profits while the imposing competitor sinks to "very low." When both dominant competitors impose adverse splits, both increase their profits, but neither obtains a "very high" increase. Thus, even when one dominant competitor has already adopted adverse splits *on its own* (a "highly unlikely" event in the first place), the other dominant competitor has a strong incentive *not* to do likewise. Importantly, the defendants have not challenged Dr. Martin's qualifications or his data to support this analysis, but rather only his conclusions. Because his conclusions follow logically from his analysis, they cannot be rejected solely as a matter of law.

Dr. Martin's reasoned rejection of the defendants' proffered explanation for their common adverse-splits policy lends additional credence to the inference that Realty One's and Smythe Cramer's conduct was not independent. The defendants claim they were forced to impose adverse splits in order to recoup the costs they incurred in training new agents; Re/Max, on the other hand, incurs no such costs, but instead recruits experienced agents from other firms. To "level the playing field," the defendants were forced to penalize Re/Max for "appropriating" the value of their investments in their experienced agents.

Dr. Martin noted, however, that real-estate agents are usually at-will employees, and that the knowledge and skill they attain is easily transferrable to other firms. Thus, a real-estate agent could leave his brokerage at any time and take all the value of his training with him. Therefore, he said, "investments and training undertaken by the real estate firm will be designed to allow for the ever present risk of agent turnover that may occur before a return can be realized." If the risk of agent turnover is incorporated into the agent's commission rate (*i.e.*, an inexperienced agent, in effect, "pays" for his training by receiving lower commissions), then a brokerage cannot lose its "incubation expenses" when an experienced agent leaves. Thus, according to Dr. Martin, the defendants' proffered explanation for their actions is pretextual.

Although there appears to be no unequivocal evidence that the defendants in fact pay their inexperienced and therefore less skilled agents less than their experienced agents (thereby placing the costs of training on the novice agent), neither has either defendant argued that it *does not* adhere to this practice. Moreover, common sense suggests that inexperienced agents earn less than experienced agents, because they are less skilled at "closing" sales. If, indeed, the defendants' agents "pay" for their own training while they are learning the trade by earning less, then the defendants suffer no loss of investment when their agents are successfully recruited by Re/Max. Instead, all Realty One and Smythe Cramer lose is that portion of their profit margin attributable to the departing-agent's sales. The fact that the defendants apparently do not enter into long-term contracts with their agents, or obtain covenants not to compete, indicates that they consider the risk of agent-investment loss to be minimal. The likelihood that adverse splits were against the defendants' interests absent a conspiracy to adopt them and that they offered an implausible explanation for the splits' adoption—both of which are sufficiently supported by the report and deposition of Dr.

Martin—raise a genuine issue of material fact whether the defendants conspired.

Second, Lee's testimony is additional evidence of the defendants' conspiracy, and is admissible against Realty One. Lee stated in an affidavit and at his deposition that in a conversation with Aveni, the CEO of Realty One, Lee asked Aveni whether the common adverse-splits policy had antitrust implications. According to Lee, Aveni responded "that there was no need to worry because someone would have to prove" he spoke to L.B. McKelvey, the principal shareholder of Smythe Cramer. At that point Aveni "leaned forward, smiled and said 'of course we didn't.'" Lee's affidavit further states, "Although cast as a denial of any wrong doing [sic], the real thrust of Avenis [sic] response was as a non-verbal affirmation that an agreement had in fact been made." Quite aside from Lee's opinion as to the legal significance of Aveni's statement, we are satisfied that the district court mistakenly concluded that Lee's testimony concerning Aveni's words and gestures were inadmissible hearsay.

Considered separately, Aveni's oral utterances and his act of leaning forward and smiling have no incriminatory meaning. But, considered together, as the constituent parts of a single, unitary assertive statement, each part integral to the others, as Aveni obviously intended, the statement unmistakably conveys the idea that Aveni actually *had* "talked" to McKelvey, but that no one would be able to prove it. As we have said, the district court ruled that Aveni's communication was inadmissible hearsay as to both defendants, and was not made admissible as "not hearsay" under Fed. R. Evid. 801(d)(2)(E), because there was not sufficient evidence of a conspiracy, and even if there was, the statement did not further the conspiracy. We hold that the district court erred in excluding Lee's testimony as to Realty One. Even if Aveni's declaration was not admissible as a statement of a coconspirator under Fed. R. Evid. 801(d)(2)(E), we are satisfied that it is "not hearsay" under Fed. R. Evid.

801(d)(2)(D) and is admissible against Realty One as a "statement by the party's [(Realty One)] agent [(Aveni)] . . . concerning a matter within the scope of the agency or employment, made during the existence of the relationship." *Id.*

Of course, Aveni's communication to Lee would not be admissible against Smythe Cramer as an admission under Rule 801(d)(2)(D), because Aveni was not an agent of Smythe Cramer. The question remains, however, whether the statement was admissible against Smythe Cramer as the statement of a coconspirator under Rule 801(d)(2)(E). A statement is "not hearsay" if it is offered against a party—Smythe Cramer—and was made "by a coconspirator of a party"—Realty One—"during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). "A 'statement is "in furtherance of" a conspiracy if it is intended to promote the objectives of the conspiracy.'" *United States v. Monus,* 128 F.3d 376, 392 (6th Cir. 1997). However, "[t]he statement need not actually advance the conspiracy to be admissible." *United States v. Clark,* 18 F.3d 1337, 1342 (6th Cir. 1994).

Although the district court thought otherwise, we are satisfied, as we have said, that there was sufficient evidence of a conspiracy in the record, with or without Lee's testimony, to defeat summary judgment. Consequently, it follows that there is sufficient evidence of a conspiracy to meet that foundation requirement for the admissibility of Aveni's statement under Rule 801(d)(2)(E). In addition to the independent evidence of conspiracy we have already discussed, Aveni's statement itself could properly have been considered by the district court in making its Rule 104(a) determination concerning the admissibility of the statement as substantive evidence under Rule 801(d)(2)(E). *Bourjaily v. United States,* 483 U.S. 171, 180-81 (1987). In all events, we have no doubt that to the extent proof of the existence of a conspiracy is a foundation fact that conditions the admissibility of Aveni's statement

under Rule 801(d)(2)(E), the plaintiffs met their burden. That having been said, however, we cannot say that the district court clearly erred in excluding Aveni's statement on the ground that it was not in furtherance of the conspiracy.

The gist of Aveni's communication—that Realty One had in fact conspired with Smythe Cramer—could plausibly be interpreted as (1) asking for Lee's silence, (2) assuring him that he was not in danger, or (3) merely boasting. The first two interpretations might well have supported a conclusion that Aveni's statement furthered the conspiracy, but the third interpretation—merely boasting—surely would not. Since the first two interpretations are not clearly preferable to the third, and since we review the district court's Rule 104(a) ruling on this preliminary question of fact for clear error only, we are satisfied that the court's finding that Aveni's statement did not further the conspiracy was not clear error, and therefore the ruling vis-a-vis Smythe Cramer, must be upheld.

2. Illegality of the Conspiracy

Even when the existence of a conspiracy between antitrust defendants has been sufficiently established, normally a plaintiff in a § 1 claim still bears the burden of proving that the defendants' agreement unreasonably restrains trade. However, such proof is not necessary when

> the challenged action falls into the category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289 (1985) (citation omitted). Generally speaking, group boycotts and refusals to deal are "so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se*

violations." *Id.* at 290. However, as the Court stated in *FTC v. Indiana Federation of Dentists,* "the category of restraints classed as group boycotts is not to be expanded indiscriminately." 476 U.S. 447, 458 (1986).

If an antitrust defendant's conduct cannot reasonably be justified as pro-competitive—viewing the facts in the light most favorable to the plaintiff according to the summary-judgment standard—then a *per se* analysis is appropriate. As the Supreme Court has stated, "A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers,* 472 U.S. at 298.

In *Northwest Wholesale Stationers,* defendant Northwest's expulsion of Pacific Stationery from a wholesale cooperative was *not* likely to result in predominantly anticompetitive effects because Northwest did not possess market power or exclusive access to an element essential to effective competition. *Id.* at 296. The Court did note, though, that a concerted refusal to deal "might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage." *Id.* at 295 n.6.

On the other hand, in *FTC v. Superior Court Trial Lawyers Association,* 493 U.S. 411, 422-23 (1990), the Court found *per se* illegal an agreement, entered into by many private lawyers who regularly represented indigent criminal defendants, to refuse assignments from the court until the District of Columbia raised their rate of compensation. Notably, the Court did not consider whether the attorneys who had agreed to the boycott in fact exercised market power. Their horizontal refusal-to-deal agreement alone "unquestionably" constituted a "naked restraint on price and output." *Id.* at 423 (internal quotation marks omitted).

While the *Northwest Wholesale Stationers* and *Superior Court Trial Lawyers* cases provide a framework for the

analysis of the present case, *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986), is particularly instructive. *Indiana Federation* makes clear that, although the "rule of reason"—which requires proof of unreasonable restraint of trade—and *per se* analysis are often discussed as if they are dichotomous, the practical difference between these two analytical tools is sometimes negligible. In *Indiana Federation,* a group of dentists conspired to deny insurance companies' requests for x-rays that the insurers needed in order to determine the necessity for dental procedures performed on their insureds. *Id.* at 451. The Court viewed the dentists' refusal as a group boycott, even though the group did allow the insurance companies to review the x-rays at the dentists' offices. In essence, the imposition of the additional cost of traveling to the dentists' offices made the dentists' conduct a refusal to deal. However, the Court did not find the refusal to deal was a *per se* violation because *Indiana Federation* differed from the paradigmatic *per se* case "in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *Id.* at 458. Apparently, *Indiana Federation* was not such a case because the boycott did not have the purpose of discouraging the dentists' customers from doing business with competitors. Thus, the Court required proof that the boycott unreasonably restrained trade.

Even though the Court applied the rule of reason, it summarily concluded that the insurance companies had met their burden of proving an unreasonable restraint of trade:

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation

> of a market or the provision of goods and services—such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place" cannot be sustained under the Rule of Reason.

Id. at 459 (citations omitted).

Notably, the Court rejected the dentists' argument that the rule-of-reason analysis must fail because the relevant market had not been defined and the Federation's market power not proven. *Id.* at 460. According to the Court, even if the Federation's boycott was not sufficiently "naked" to require it to come forward with some procompetitive justification, sufficient proof of the boycott's actual detrimental effects obviated the need for detailed market analysis. *Id.* at 460-61. In that case, the FTC had found that in the communities of Anderson and Lafayette, Indiana, the Federation had obtained the cooperation of "heavy majorities" of dentists and had effectively thwarted insurers' requests for x-rays in those areas. These findings of detrimental effects, "*viewed in light of the reality that markets for dental services tend to be relatively localized,*" were "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." *Id.* at 461 (emphasis added). Moreover, the proof that insurers' requests had been effectively denied was sufficient to support the unreasonable-restraint finding, even absent any proof that the dentists' refusal to deal resulted in higher prices for consumers. *Id.* Thus:

> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.

Id. at 461-62.

Here, in applying *per se* analysis, the district court characterized Realty One's and Smythe Cramer's adverse-splits policy as price-fixing. However, we conclude that the practice is more akin to a refusal to deal. The defendants did not conspire to set the commission fee charged to home-buying and selling consumers for the agents' services. Neither did they agree to pay their agents the same dollar amount or even to adopt the same agent-brokerage commission split. Instead, the defendants agreed to adopt the same broker-broker commission split on every transaction in which a *Re/Max* agent represented the buyer.

In essence, this is a refusal to deal. Like the dentists in *Indiana Federation,* Realty One and Smythe Cramer did not completely shut out the boycotted entity, but they did impose additional costs on the boycott victims. In the case of the dentists, this was accomplished by making the insurance companies come to the dentists' offices to review dental records; in the case of Realty One and Smythe Cramer, it was accomplished by reducing the compensation of any agent who defected to a Re/Max franchise, thereby making Re/Max pay even more to its agents if it wanted to keep them. Individually, the defendants *admitted that their intent* in adopting the adverse-splits policy was to prevent their agents from joining Re/Max. Thus, Re/Max has been forced to pay an even higher premium to obtain the information and experience held by the defendants' agents. Re/Max alleges that the higher premium is economically unsustainable, and has forced some franchises to close and prevented others from opening.

Of course, just because Re/Max is harmed does not necessarily mean that the public is also adversely affected by the defendants' practice. If Re/Max "loses" because its system is less efficient, then its injury is not actionable. However, if the Re/Max system provides a benefit to

consumers, and if Re/Max's losses are due to the defendants' use of market power to prevent a more-efficient competitor from establishing itself, then an antitrust violation is made out.

The record contains sufficient evidence for a reasonable jury to conclude that the Re/Max 100% Concept enhances efficiency and provides a benefit to the public, and that the likely effect of the defendants' conduct was primarily anticompetitive. That is, Re/Max has provided sufficient evidence that its 100% Concept compensates successful agents at a greater rate than the traditional 50/50 agent-brokerage split the defendants use. If this evidence is credited, then Re/Max will attract the most successful agents in the area served by one of its franchises if the market is truly free.

This concentration of top agents in one place would have several potential advantages for home buyers and sellers. First, because these agents are by definition the most efficient, they very likely require less administrative support per dollar of revenue. In a competitive market, Re/Max would be forced to pass along some of this savings to clients. Second, since the 100% Concept has been implemented nationwide, consumers can count on highly skilled, experienced Re/Max agents no matter where they seek to buy or sell a home. Such consumers may avoid having to gather information in order to locate competent agents and may rely on Re/Max's reputation for hiring only the best agents, thereby saving valuable time. Third, consumers save time in the buying and selling process when an experienced agent more quickly understands their needs and does not match them up with unsuitable prospects. In sum, a jury could find from the evidence that the Re/Max system directly and indirectly lowers the cost and improves the quality of brokerage services offered to the public.

The response the defendants offer to these suggested advantages that can be realized when doing business with a Re/Max broker is not persuasive. To reiterate, the defendants offer two justifications (defenses) for their imposition of the

adverse-splits policy: First, that they are merely protecting their investments in their experienced agents; second, that they are fending off an attempt by Re/Max to use its national economic resources to *overpay* experienced northeast Ohio agents until Re/Max has established its own monopoly in the market for such agents and driven the defendants out of business. As for the first of these, if the defendants have any investment in their novice agents, they can protect that investment by, for instance, signing agents to long-term contracts or obtaining covenants not to compete. Of course, either of these options would increase costs by providing job security to potentially unproductive agents or by paying additional compensation in exchange for a noncompetition covenant. If Re/Max can economically offer greater compensation than the defendants provide, then by definition either the Re/Max system is an efficiency-increasing innovation or the defendants are reaping monopolistic profits, or both. On the other hand, if Re/Max cannot economically offer greater compensation, but is doing so only temporarily and absorbing the loss through its national resources in order to obtain a monopoly in northeast Ohio, then not only must Re/Max lose on its own claims, but Realty One's counterclaims must be sustained. This is the fulcrum on which this case turns.

We reject, as a matter of logic and law, the suggestion that Re/Max is transferring resources into northeast Ohio in order to offer experienced agents there economically irrational compensation through Re/Max's 100% Concept. Simply put, this is impossible. There is no dispute that Re/Max requires all its franchises to adhere to the 100% Concept. Thus, if the concept were economically unsustainable in northeast Ohio, it would not be sustainable anywhere, and certainly would not be capable of supporting a national network of franchises *and* a money-losing effort in northeast Ohio.

Therefore, viewing the disputed facts in the light most favorable to Re/Max, as we must, and rejecting the

defendants' justifications as a matter of law because no reasonable jury could believe them, we conclude that the plaintiffs have adduced sufficient evidence to resist summary judgment on its claim that the defendants conspired to unreasonably restrain trade in violation of § 1 of the Sherman Act.

B. Plaintiffs' § 2 Monopolization Claims

Some plaintiffs' § 2 claims were also erroneously dismissed on summary judgment.

Although the district court correctly concluded that Re/Max failed to define the relevant geographic markets, the court erroneously rejected evidence tending to show that the defendants had the ability to exclude competition. For instance, Re/Max presented evidence showing that the adverse-splits policy has prevented new Re/Max franchises from forming and may have driven several franchises out of business. Additionally, there is evidence that adopting adverse splits without market power is economically irrational, and that doing so has failed elsewhere. Because these factors raise genuine issues of material fact, summary judgment against Re/Max on the § 2 monopolization claims was inappropriate.

The offense of monopolization under § 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71.

There are two ways to establish the first element, that is, that the defendant holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979). The second is by presenting circumstantial evidence of

monopoly power by showing a high market share within a defined market. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-97 (1st Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a "shortcut." However, this does not undercut the continued viability of the first avenue of establishing monopoly power. For the reasons below, we find that although the plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendants' monopoly power through circumstantial evidence, there does exist a genuine issue of material fact as to whether the plaintiffs' evidence shows direct evidence of a monopoly, that is, actual control over prices or actual exclusion of competitors. A geographic market is defined as an "'area of effective competition.'" *Moore v. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977) (citation omitted). Although such an area is not subject to definition by metes and bounds, *see White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 503 (6th Cir. 1983), it is the locale in which consumers of a product or service can turn for alternative sources of supply, *see Moore*, 550 F.2d at 1218. Obviously, at the outer edges of a *bona fide* geographic market, buyers may be able to cross into other territory for their supply of a product or service; however, this fact alone does not require a rejection of the claimed market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359-60 (1963).

On the other hand, when the evidence indicates that a large proportion of consumers within the proposed area in fact turn to alternative sources of supply outside the proposed area, the market boundaries posited by the plaintiff must be rejected. *See Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 346 (8th Cir. 1995). Dr. Martin in his report devoted 16 pages to defining the relevant geographic markets. He concluded that each of the 161 municipalities and townships in northeast

Ohio as listed on the relevant multilisting service (MLS) was its own market for brokerage services and for real-estate agents. As support, Dr. Martin noted the following: there are few economies of scale in consolidating many agents into one office covering more geographical area; at least one study has shown that 70% of home sales occur within five miles of the listing-agent's office; franchise operators frequently limit their franchisees' territory to a one-mile radius around the franchise office; and franchisors expanding into new territory do so by acquiring existing brokerages because they regard as critical the local knowledge possessed by local agents. Furthermore, the plaintiffs' expert noted that market-share data are tracked community by community, and the MLS data are also broken down that way because the information is only useful community by community.

Relying on statements of the principals of Realty One and Smythe Cramer, Dr. Martin testified, in essence, that real-estate agents possess knowledge specific to the communities in which they operate and do not compete for buyers or sellers outside their communities. For the same reasons, brokerages compete for experienced agents only within their respective communities, because an agent's experience in another community is much less valuable.

But none of this comes close to establishing that each political subdivision in northeast Ohio constitutes a separate area of effective competition. Although Dr. Martin's report establishes that agents' knowledge is restricted to a relatively small area, there is almost no evidence that the small geographic area in which an agent has expertise coincides with the corporate or geographic limits of the city or town in which that agent operates. It is not only conceivable, it is almost inescapable, that agents and consumers located close to boundary lines will cross over to adjacent cities and towns to provide and to seek brokerage services. Indeed, the evidence indicates that some Re/Max agents do business in more than one city or town.

It is highly likely that Realty One and Smythe Cramer agents also service more than one political area. It is also highly likely, and what is more important is that there is no evidence to the contrary, that persons looking to buy houses will not restrict their searches to homes within a particular city or town, especially when the relevant characteristics of adjacent municipalities are largely indistinguishable, as is often the case in suburban communities. The fact that Smythe Cramer and Realty One have offices in only 34 and 41, respectively, of northeast Ohio's 161 cities and towns strongly suggests that the relevant geographic markets in this region consist of more than one political subdivision.

We recognize, of course, that no real-estate market is airtight. There will always be persons from outside a geographic market seeking to buy a home inside the market, and there will always be persons looking at potential homes in two adjacent markets. Nevertheless, we believe that a relevant geographic market for real-estate brokerage services and agents can and must be proved to a greater degree of specificity than the plaintiffs have done here. Re/Max has shown to our satisfaction that such geographic markets are relatively small, but their argument that the boundaries of these markets correspond with city or town lines is almost completely arbitrary. There is no evidence, for instance, regarding the percentage of homes sold by particular agents in particular cities. If Re/Max's market definition were accurate, one would expect that agents serving a particular city would receive close to 100% of their commissions from sales within that city, and similarly, that individuals seeking to sell their homes would seek out agents within their local boundaries. However, there is no evidence in the record that this is the case. Thus, we think, plaintiffs have failed to adduce sufficient evidence that each city and town in northeast Ohio is a separate area of competition for valuable real-estate information.

Alternatively, Re/Max argues that it need not define the relevant geographic markets for § 2 purposes if it can show the defendants have actually succeeded in setting prices or excluding competition. The plaintiffs point to evidence that sales commissions are higher and less negotiable in northeast Ohio than elsewhere in the U.S.; that Realty One has admitted being able to charge high rates in the western Cleveland suburbs because of its market dominance there; and that both defendants have been successful in imposing adverse commission splits which would be economically impossible to do without monopoly power.

We agree that an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition. This court recognized such a rule in *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir. 1979) (citing *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)). In *Byars*, the plaintiff received periodicals from a regional distributor and distributed them to small retailers in exchange for 10% of sales. Eventually, the regional distributor decided to refuse to deal with the plaintiff—who this court deemed an independent contractor—and began distributing the periodicals to the small retailers directly. *Id.* at 848.

Although the district court found no § 2 violation, this court remanded for "fresh fact-finding" and directed the district court to consider not only the defendant's market share, but also whether the customers for which the parties were competing received "inferior service at greater cost" once the defendant prevented the plaintiff from servicing the small retailers and left the latter no alternative source of supply. *Id.* at 852, 853 n.26. If the evidence that the retailers received less service at greater cost was credited by the district court, it "lends strong support to plaintiff's contention that [the defendant] possesses monopoly power." *Id.* at 853 n.26. As

we stated: "[T]he simplest way of showing monopoly power is to marshal evidence showing the exercise of actual control over prices or the actual exclusion of competitors." *Id.* at 850.

This view has been adopted, at least implicitly, in four sister circuits: the First, Eighth, Ninth, and Tenth. *See, e.g., Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196-97 (1st Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1993); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 966-67 (10th Cir. 1990). As the Eighth Circuit has stated:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Flegel, 4 F.3d at 688 (quoting *Indiana Fed'n*, 476 U.S. at 461). Other circuits also look to evidence of actual detrimental effects in the absence of market definition and market share, but require unambiguous evidence that a defendant can control prices or exclude competition. *See, e.g., Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1362 (2d Cir. 1988). On the other hand, the Fifth Circuit has rejected a plaintiff's claim in light of the defendant's low market share even though there was evidence of control over prices. *See Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 526 (5th Cir. 1982).

The Supreme Court has noted on at least two occasions that direct evidence of monopoly power will support an antitrust claim. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 477 (1992); *Indiana Fed'n*, 476 U.S. at 460-61. In *Eastman Kodak*, Kodak was accused of "tying" the

sale of one product to the purchase of a separate product from Kodak, in violation of § 1. After the Court found sufficient evidence that Kodak had in fact tied the two products, it turned to the next question: whether Kodak had the power to raise prices and restrict output in the market for the secondary product. *See* 504 U.S. at 464. Because evidence existed that Kodak had increased prices and excluded competition in the market for the secondary product, it bore the "substantial burden" of proving that it did not, in fact, possess monopoly power. *Id.* at 469.

Similarly, the *Indiana Federation* Court rejected defendant Federation's contention that the lack of proof regarding the relevant market required summary judgment in its favor. 476 U.S. at 460. Instead, the Court looked to evidence that the Federation had actually defeated insurance companies' requests to view insureds' x-rays in holding that detailed market analysis was not required. *Id.* at 461. As the *Indiana Federation* Court noted:

> [T]he finding of actual, sustained adverse effects on competition in those areas where [Federation] dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

Id. The defendants contend that these cases are inapposite because they do not discuss § 2. However, we see no reason to believe that monopoly power in the § 1 context is any different from the § 2 monopoly power the plaintiffs allege here.

Similarly, there is sufficient evidence in this case to permit a jury to conclude that markets for real-estate brokerage services are relatively localized, even if they are larger than those the plaintiffs posit, and that there have been actual, sustained adverse effects on competition in those areas where

one defendant or both predominate. Therefore, the plaintiffs have sustained their burden at this stage of proceedings despite the lack of reasonable and detailed market analysis.

Of course, the defendants also challenge the plaintiffs' factual claim that the defendants have actually exercised monopoly control. First, the defendants reject both the basis and the relevance of the conclusion that northeast Ohio sales commission rates are higher than in other comparable metropolitan areas. As for the basis, defendants argue that: (a) the study in question reviewed data for 1991 only, when the relevant time period here is 1987 to 1995; (b) there is no evidence that the rates charged by the defendants are not economically justified; (c) there is no evidence that commission rates are high in individual markets, as opposed to the whole northeast Ohio region; (d) there is no evidence that either of the defendants charges a lower rate in those areas where Re/Max admits neither defendant has a monopoly; and (e) Re/Max agents usually charge the same rates as the defendants' agents. As for the relevance of the challenged conclusion, the defendants argue that even if a defendant's rates are higher than the norm, this does not demonstrate that a defendant has the power to set them, as opposed to being able to charge more for better service.

Second, the defendants deny that their ability to impose adverse commission splits demonstrates monopoly power. They argue that many Re/Max franchises have opened *after* the imposition of adverse splits, thus showing that the splits policy cannot exclude competition. Neither, they claim, does the policy have any effect on consumers, in light of the fact that the splits are aimed against agents and in the absence of evidence that rates paid by clients have risen since the policy was adopted. Interestingly, Realty One indicates that it has not excluded competition because the adverse-splits policy was *unsuccessful* in preventing agents from defecting to Re/Max.

We agree, for the reasons stated by the defendants, that Re/Max's argument regarding the 1991 survey may be rejected out of hand. But, the plaintiffs' other argument—that the defendants' ability to impose adverse splits demonstrates their monopoly power—is considerably more plausible. Obviously, if a monopolist successfully uses its power to prevent competition from ever entering the marketplace, the losing competitor's antitrust claim should not be dismissed simply because the monopolist's prices remained constant, because the plaintiff cannot show it was ever established in the market, or because the plaintiff was able to survive for a period before being forced to terminate operations. In any of these situations, consumers would be harmed if the new competitor offered better service at the same price as the monopolist, but was defeated because of the monopolist's refusal to deal. As we have discussed, Re/Max has made out a justiciable case, at least for purposes of resisting summary judgment, that its system provides better service to real-estate consumers. Thus, if the evidence, viewed in the light most favorable to Re/Max, clearly demonstrates the defendants' ability to exclude Re/Max from the marketplace, summary judgment should not have been entered for the defendants.

There is evidence that several potential Re/Max franchisees declined to purchase franchises once they learned of the adverse-splits policy, and that at least eight franchises and the regional subfranchisor have gone out of business. Additionally, the report of the plaintiffs' expert clearly demonstrates that all of the plaintiffs lost considerable sums as the result of the defendants' practices. This is because experienced agents have been reluctant or unwilling to join Re/Max in light of the threat of adverse commission splits.

It appears that adverse-splits policies have failed when attempted in other markets. This fact, when combined with the evidence that such policies are economically irrational absent market dominance, strongly suggests that the defendants' ability to sustain adverse splits for more than ten

years arises from monopoly power, whether exercised individually or collectively. Although the issue is close, we find that Re/Max has presented evidence sufficient to permit a jury to conclude that the defendants possess the ability to exclude competition in the residential real-estate markets comprising northeast Ohio.

Of course, the evidence supporting Re/Max's claim that the defendants have monopoly power cuts against its theories of attempted monopolization and conspiracy to monopolize. That is so because there is evidence indicating that adverse-splits policies work only when the imposer already exercises monopoly power. The report of the plaintiffs' expert effectively concludes that any attempt or conspiracy to achieve a monopoly *through* imposing adverse splits would be doomed to failure. The fact that the policy has been effective demonstrates, according to the plaintiffs' own theory, that defendants already exercise monopoly power, and perforce, defeats the plaintiffs' additional claim that the defendants attempted or conspired to obtain a monopoly. Therefore, no reasonable jury could find that either defendant has attempted or conspired to monopolize.

C. Statute-of-Limitations Defense

The statute of limitations for federal antitrust actions is four years from the accrual of the action. 15 U.S.C. § 15b. A cause of action accrues when a defendant commits an act that injures the plaintiff's business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Courts look to a defendant's overt acts, rather than the effects of those acts. *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990). The district court held that no plaintiff's § 1 conspiracy claim is barred, because the plaintiffs produced evidence that the defendants fraudulently concealed evidence of their agreement to impose adverse splits against Re/Max.

The defendants argue that their splits policy was promulgated in 1987, therefore putting the plaintiffs on notice

as of that date. But that is beside the point, at least as to the conspiracy issue. The plaintiffs could not have proceeded with their conspiracy claims without some evidence of a conspiracy between the defendants. Mere suspicion of a conspiracy is not enough, and certainly mere knowledge of the adverse-splits policy, without evidence that the defendants acted in concert, is insufficient. Further, there appears to be no dispute that the first hard evidence of a conspiracy was the Lee affidavit obtained by the plaintiffs in 1992. Thus, at least as to the § 1 conspiracy claims, the defendants' statute-of-limitations defense must fail.

However, the defendants are correct that most of the plaintiffs' § 2 monopolization claims are barred. Although the district court ruled otherwise on this issue, its ruling rested on the ground that Smythe Cramer had acquired another real-estate brokerage in one of the allegedly monopolized markets in 1992 or 1993. However, as we have indicated, the monopolization claims here relate to the defendants' use of adverse commission splits. Smythe Cramer's accumulation of additional market share through acquisitions may be evidence of its monopoly power, but the injury to the plaintiffs' businesses is the adoption of the adverse-splits policy in 1987. It appears that plaintiffs Re/Max International, Re/Max Key Realty, Re/Max Property Professionals, Re/Max Northeast Ohio, Re/Max Realty Properties, True Independence Partnership, and R.E.P. all had notice of the defendants' adverse-splits policy prior to 1990. Therefore, those plaintiffs' § 2 claims are time-barred. Plaintiffs Re/Max Crossroads, Re/Max Affinity, Re/Max Results, Re/Max Xpress, and Zames Realty, however, do not appear to have received notices until after 1990, and their claims are not barred.

D. Standing Defense

The defendants also maintain that the franchisor and subfranchisor plaintiffs lack standing to bring antitrust claims

because Re/Max International and Re/Max Northeast Ohio can show no antitrust injury and are not the appropriate parties to bring these causes of action. We disagree.

The question of the franchisor-plaintiffs' standing may be resolved by reference to *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*), 459 U.S. 519 (1983), and to *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

Although a discussion of these cases will necessarily extend this already extensive opinion, we think they provide a useful background for our conclusion concerning the sometimes abstruse standing doctrine. In *AGC,* a union sued an association of employers, claiming that the association coerced its members and other employers to enter into business relationships with nonunion firms. The union alleged that this coercion diverted business opportunities from unionized firms, and thereby adversely affected the union itself. 459 U.S. at 520. The Court rejected the union's claim to standing on several grounds. First, although the union alleged a causal connection between the antitrust violation and the harm the union suffered, and also that the defendants intended to cause that harm, the Court held that the injury was not the type that the Sherman Act was meant to prevent because labor-relations issues fall under "a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions." *Id.* at 540.

Second, the Court said, the injury to the union was speculative and indirect: the union had alleged only unspecified injuries to its "business activities," and the injuries were derivative of the injuries to the unionized contractors who lost jobs to nonunion firms. *Id.* at 541. If either the unionized association-member firms or the other coerced employers had suffered an injury attributable to the antitrust

violation, they would have a valid antitrust cause of action. However,

> [t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Id. at 542. The speculative nature of the injury was confirmed by the lack of any allegation that the share of the contracting market controlled by unions had decreased, that the number of union members had declined, or that the union's dues or initiation fees had decreased. Moreover, there was no allegation that any employer was prevented from hiring a unionized contractor, as opposed to being forced to hire certain nonunionized firms. *Id.*

Third, the difficulty in computing damages if the union were granted standing stood as a final barrier to the union's claim. If the union had standing, the trial court would potentially face the daunting task of determining to what extent business was diverted from unionized contractors; identifying the union's damages; and apportioning damages among directly injured contractors, unions, and union employees. *Id.* at 545.

In *Southaven,* we summarized *AGC's* test for antitrust standing as consisting of five factors:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related

> inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

715 F.2d at 1085. In that case, the owner-lessor of retail commercial space, plaintiff Southaven, rented space for a grocery store to a wholesale-retail food, drug, and sundries merchant, defendant Malone. Malone, in turn, rented the space to a subtenant grocery store. *Id.* at 1080. When the subtenant declared bankruptcy, Southaven and Malone reached an agreement regarding the vacant space which released Malone from its obligations at the site in exchange for Southaven's resumed control of the site and the equipment therein. However, when Malone discovered that Southaven was going to lease the space to a competing grocery store, Malone rescinded the agreement, allegedly in order to preserve its monopoly in area grocery stores. *Id.* at 1081.

We held that Southaven did not have antitrust standing under the five-factor test. Although Southaven had alleged a causal connection between its injury and an antitrust violation and that Malone intended the harm, Southaven was not a competing grocery store and thus was not a customer or participant in the relevant market. *Id.* at 1086. Therefore, its injury was an indirect by-product of the anticompetitive conduct, and not "inextricably intertwined" with an injury to the relevant market. *Id.* at 1086-87. Additionally, grocery consumers and other grocery stores would have been better plaintiffs. Moreover, Southaven had alleged no direct injury: it had not lost any income from the property, either through Malone's default or an increase in rent promised by the new tenant. Read liberally, Southaven's claim for damages rested on the premise that it could charge more to tenants in a development that included a grocery store. We held that this was too speculative. *Id.* at 1088.

Here, however, the franchisor-plaintiffs have standing to pursue their claims. First, they have provided sufficient evidence that they suffered an antitrust injury caused by the defendants' anticompetitive conduct. Through the implementation of adverse splits, the defendants prevented Re/Max agents from earning their normal commission on most transactions, which in turn prevented Re/Max's 100% Concept from functioning, which prevented Re/Max from attracting top agents, which prevented Re/Max franchises from succeeding, which prevented Re/Max from earning revenue from those franchises and agents and from opening new franchises. While this chain of causation may be long, it is direct and unbroken.

Second, Re/Max's injury is of the type sought to be redressed by antitrust law. As we have indicated, sufficient evidence exists to conclude that adverse commission splits are anticompetitive. The defendants admit they intended to thwart, through the implementation of adverse splits, Re/Max's attempt to recruit defendants' agents. Although the policy was aimed more directly at Re/Max franchises, the effect was to deter agents from defecting to Re/Max, thereby impeding an innovative competitor's access to the market. Unlike in *AGC,* here, denying the franchisors standing would result in antitrust violations going "undetected or unremedied," if in fact Re/Max franchises were barred from northeast Ohio markets.

Third, the franchisors' damages are not speculative. Their expert has sufficiently broken down lost revenue by year and by category, comparing the 100% Concept's lack of success in northeast Ohio with the pattern of marked growth seen in comparable areas where established brokerages have competed for experienced agents by raising their compensation, rather than implementing adverse commission splits. Certainly, the precision of these calculations is subject to question; however, unlike in *AGC* and *Southaven,* here there is concrete and measurable evidence of direct damages.

Fourth and fifth, there is evidence that the more direct victims of the defendants' alleged conspiracy are the Re/Max franchises, and their existence complicates the calculation and apportionment of damages. Thus, we hold that the franchisors may not include in their claim for damages management fees, commissions, franchise fees, or renewal fees that were lost because of the effect of the adverse-splits policy on existing Re/Max franchises. If, upon remand, the Re/Max franchise-plaintiffs are successful in showing the defendants' liability, the franchises should be fully compensated for any lost earnings they can prove. Once these franchises are made whole, the franchisor-plaintiffs will then be due their portion.

IV. REALTY ONE'S COUNTERCLAIMS

Realty One maintains that the district court erroneously dismissed five of its counterclaims. To reiterate, Realty One has charged Re/Max with (1) conspiring to monopolize the northeast Ohio real-estate market by "combin[ing] their financial and other resources to work unlawfully in concert against local real estate brokers," (2) conspiring to unreasonably restrain trade by agreeing not to recruit other Re/Max agents, (3) conspiring to offer 50/50 commission splits in cooperative transactions with other brokerages, (4) interfering in Realty One's business relationships with its customers and agents in violation of Ohio state law, and (5) engaging in unfair competition by bringing sham litigation, also in violation of Ohio law.

A. Realty One's §§ 1 and 2 Antitrust Counterclaims

Certainly, the district court's rulings dismissing Realty One's three antitrust issues, (1), (2), and (3) above, must be affirmed. First, the district court dismissed the conspiracy to monopolize claim because Realty One had failed to define the relevant geographic markets. In the district court, Realty One relied on the same market definition used by Re/Max. Its argument on appeal is that, if the markets defined by Re/Max are valid for Re/Max's § 2 claims, they must be valid for

Realty One's counterclaims. However, we have found that Re/Max had failed to meet its burden in this regard, which correspondingly precludes Realty One's § 2 counterclaim. Unlike Re/Max, Realty One has not alleged or shown any actual effect on prices or competition resulting from Re/Max's alleged anticompetitive conduct that would save Realty One's failure to define the geographic markets.

Second, the district court dismissed Realty One's claim that Re/Max franchises had illegally agreed not to recruit each other's agents, reasoning that Realty One had not sustained an antitrust injury from this conduct. We agree. Even assuming, as we must, that Re/Max did so conspire, the conspiracy would have no anticompetitive effect on Realty One's ability to retain and recruit successful agents. In particular, Realty One alleges that Re/Max franchises conspired to set the commissions for its agents at 95 to 100%, and that they agreed to target only non-Re/Max agents for recruitment. Absent an allegation that Re/Max has market dominance, the only possible way that these conspiracies could have an unreasonable effect on commerce is if the national Re/Max network shifted resources into northeast Ohio to absorb a short-term loss so that Re/Max could gain a long-term monopoly. However, as we have said, this theory is logically flawed: Re/Max's 100% Concept is required of all franchises throughout the country; if it were economically unfeasible, there would be no national network from which to draw.

What remains of Realty One's counterclaim does not state an antitrust violation regarding the supply or the demand for agents. As for demand, Realty One's argument is inherently contradictory. On the one hand, Realty One maintains that Re/Max entices Realty One's agents with the promise, whether accurate or not, of higher compensation. This would increase demand for agents. On the other hand, Realty One contends that Re/Max agrees to limit intra-Re/Max competition, thereby *depressing* demand for experienced agents. If Re/Max has increased demand, there is no antitrust

injury because increased competition does not offend the antitrust laws. If Re/Max has decreased demand, then Realty One is benefitted and has sustained no injury at all.

Realty One also seems to argue that Re/Max's conspiracy decreases agent supply. However, while Re/Max franchises may have intentionally reduced the pool of agents that they will recruit, nothing prevents Realty One from recruiting any agent in the market. In other words, nothing Re/Max does, save offering seemingly greater compensation for successful agents, hinders Realty One from retaining its own agents or obtaining new agents from other brokerages.

Third, Realty One's final antitrust counterclaim—that Re/Max franchises conspired with each other and with the franchisors to set cooperative commission rates at 50/50—is also legally insufficient. As we have said, setting cooperative sales-commission rates is not price fixing: it has no relation to the amount charged to clients for an agent's services. Thus, *FTC v. Superior Court Trial Lawyers Association,* 493 U.S. 411 (1990), is inapplicable. Rather, cooperative rates constitute incentives for non-listing agents to show the listed property. We found that Re/Max has made out a jury-submissible claim that Realty One's and Smythe Cramer's 70/30 and 75/25 splits constitute a boycott of Re/Max's agents, and that the policy was illegal because it was backed by the defendants' market dominance. Here, however, there is no allegation that Re/Max possesses monopoly power, or that its traditional 50% cooperative commission rate has an unreasonable effect on commerce. The fact that Re/Max franchises agree to adhere to the "going rate" cannot, under these circumstances, constitute an antitrust violation.

B. Realty One's Business-Tort State-Law Counterclaims

First, Realty One claims that Re/Max personnel repeatedly told Realty One's clients that the adverse-splits policy would hurt their chances of selling their homes, and told Realty One's sales people that the policy thereby harmed them as well. Realty One maintains that these "false and maliciously wrongful attacks" constitute unfair competition and malicious interference with business relations under Ohio law. The district court dismissed the claim because Realty One provided no evidence of any agent or customer with whom Re/Max had interfered. Although it acknowledges this failure, Realty One contends that the difficulty in demonstrating which customers and which sales agents were lost as a result of the allegedly unlawful conduct "is precisely why Realty One sought and should receive injunctive protection rather than damages." However, absent the identification of any irreparable harm, this counterclaim must fail.

Second, Realty One claims that Re/Max engaged in malicious litigation, and points to the same evidence that the district court found supported Realty One's antitrust sham-litigation claim. Realty One cites *Water Management, Inc. v. Stayanchi,* 15 Ohio St. 3d 83, 472 N.E.2d 715 (1984). That case, however, has nothing to do with malicious litigation, except for the fact that the court mentions in passing that malicious litigation is one form of unfair competition. *See id.* at 717. *Robb v. Chagrin Lagoons Yacht Club, Inc.,* 75 Ohio St. 3d 264, 662 N.E.2d 9 (1996), on the other hand, sets out the elements of malicious civil prosecution. One requirement is that the plaintiff's person or property have been seized during the course of the prior proceedings. *See id.* at 13. This element has not been alleged by Realty One. Thus, Realty One's state-law claims were also properly dismissed.

V. CONCLUSION

We conclude that the district court erroneously ruled that no genuine issue of material fact exists on the issue of the plaintiffs' claims that the defendants conspired to adopt adverse commission splits. Similarly, the court failed to adequately consider evidence raised by the plaintiffs that the defendants have actually excluded competition in northeast Ohio, in violation of § 2 of the Sherman Act. Nevertheless, because their standing is limited to claims that cannot properly be brought by an existing individual franchisee, franchisors Re/Max International and Re/Max Northeast Ohio may not recover § 1 damages that duplicate any franchisee's damages. Thus, entry of summary judgment for the defendants on the franchisee-plaintiffs' § 1 claims is **REVERSED.** Judgment is **AFFIRMED IN PART, AND REVERSED IN PART**, on the franchisor-plaintiffs' § 1 claims.

Summary judgment on the § 2 claims of Re/Max Crossroads, Re/Max Affinity, Re/Max Results, Re/Max Xpress, and Zames Realty was erroneously entered in light of evidence that the defendants actually excluded competition from the market. However, judgment against the remaining plaintiffs' § 2 claims was appropriate on the ground that the four-year statute of limitations had expired as to them. Therefore, judgment against Re/Max Crossroads, Re/Max Affinity, Re/Max Results, Re/Max Xpress, and Zames Realty is **REVERSED**, and that against the remaining plaintiffs is **AFFIRMED**.

The various judgments dismissing Realty One's state and federal counterclaims are **AFFIRMED**.

This case is **REMANDED** for proceedings consistent with this opinion.

ADDENDUM

Plaintiffs A.E.B.T.S., Inc. ("Re/Max Crossroads Properties"), T.M.A.T.N.B., Inc. ("Re/Max Affinity, Inc."), D.F.I., Inc. ("Re/Max Results"), Joseph P. Grady, Inc. ("Re/Max Xpress"), McGrew Realty, Inc. ("Re/Max Key Realty"), Property Professionals, Inc. ("Re/Max Property Professionals"), Zames Realty, Inc. ("Zames Realty"), Realty Properties, Inc. ("Re/Max Realty Properties"), True Independence Partnership ("True Partnership"), and R.E.P., Inc. ("R.E.P.") are all Re/Max franchises located in northeast Ohio. Although it is unclear whether the record is complete in this regard, it appears that Re/Max franchises operate in the following northeast Ohio cities: Re/Max Crossroads has offices in Strongsville and Westlake; Re/Max Affinity, in Westlake; Re/Max Results, in Concord Township, Mentor, and Painesville; Re/Max Xpress, in North Canton; Re/Max Key Realty, in Akron; Re/Max Property Professionals, in Hudson; Zames Realty, in Mentor and Painesville; Re/Max Realty Properties, in Westlake; Re/Max Reality, in Broadview Heights; Re/Max Abbey, in Aurora; Re/Max Partners, in Canton; Re/Max Experts, in Dover; Re/Max Premier Service, in Rocky River; True Partnership, in Bay Village; and R.E.P., in Broadview Heights.

Realty One appears to have offices in Akron, Amherst, Aurora, Avon Lake, Bay Village, Brecksville, Brunswick, Chagrin Falls, Chesterland, Cleveland (3), Cuyahoga Falls, Elyria, Euclid, Garrettsville, Hudson, Lakewood, Lorain, Lynchurst, Madison Township, Maple Heights, Mayfield Village, Medina, Mentor, North Olmsted, North Ridgeville, North Royalton, Parma Heights, Pepper Pike, Rocky River, Sagamore Hills, Shaker Heights, Solon, Strongsville, Vermillion, Wadsworth, Westlake, Willowick, and Woodmere.

The record indicates that Smythe Cramer has offices in Akron, Aurora, Avon Lake, Bay Village, Brecksville,

Brunswick, Canton, Chagrin Falls, Chardon, Chesterland, Cleveland Heights, Elyria, Euclid, Gates Mills, Green Township, Hudson, Lakewood, Lander Circle, Lyndhurst, Madison, Medina, Mentor, Middleburg Heights, North Olmsted, Pepper Pike, Rocky River, Seven Hills, Shaker Heights, Solon, Stow, Strongsville, Wadsworth, and Willoughby.

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No. 01-1154

In The

Supreme Court of the United States

REALTY ONE, INC.,

Petitioner,

v.

RE/MAX INTERNATIONAL, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Realty One, Inc. respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respondents' brief raised four issues not addressed in Petitioner's Petition for a Writ of Certiorari which are incorrect as a matter of fact and law or irrelevant to the question presented for resolution here.

1. Respondents' argument that the decision below is not contrary to this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), that of every other circuit court decision which has considered this issue, and earlier decisions in the Sixth Circuit is based on a misreading of the record and *Kokkonen*. Respondents argue that the second sentence of the July 14 dismissal order which states "[a]ny subsequent order setting forth *different terms and conditions relative to the settlement and dismissal* of the within action shall supersede the within order" Pet. App. 67a (emphasis added), "reserves authority to issue subsequent orders altering the terms and conditions of the settlement." Res. 10. Respondents' statement assumes the answer they seek – that the district court reserved jurisdiction to enforce the settlement agreement. It did not.

The language selected by the district court is consistent with the terms of the July 13 settlement agreement and the limits of the court's authority. The July 13 settlement agreement states that the parties will undertake to write additional papers to compliment and/or supplement their complete and binding settlement agreement.

The July 14 dismissal order permits the district court, should the parties of their own accord decide to alter the terms of their contract, to enter the new terms on the record in lieu of, or in addition to, those the district court had previously entered on July 13 when it read the terms of the agreement into the record. The district court's July 14 dismissal order does not, and could not, give the court authority to alter the terms of the settlement contract. The parties write settlement agreements, not the court.

If Respondents wanted the court to retain jurisdiction to enforce the agreement the term should have been included in the July 13 settlement agreement, not raised in a motion to enforce settlement after dismissal with prejudice. Respondents chose not to negotiate to include that term in the agreement and should not be permitted to add it now by misinterpreting the dismissal order.

Moreover, Respondents' interpretation of the July 14 dismissal order would permit the district court to extend its jurisdiction beyond the limits set by the Constitution, encroach into areas typically reserved for state courts, and impermissibly assume the settlement contract writing authority of the parties – authority which would undermine the entire settlement process. The order does not give the district court this authority, nor could it.

2. Respondents claim that this case is a "poor vehicle" because Realty One "concedes that there was 'no motion in the record by the plaintiffs as required by Rule 41(a)(2). . . . ' " Res. 12. This claim is belied by the record.

First, Realty One did not make any such concession. Realty One merely pointed out the discrepancy between

the Sixth Circuit's claim that the basis for the July 14 dismissal order was Rule 41(a)(2) and Respondents' argument that it could not have been Rule 41(a)(2). Pet. 21.

Second, Respondents' claim that the basis for the dismissal order was not Fed. R. Civ. P. 41(a)(1) (stipulation of the parties) or that such an order could not be entered for 45 days also mischaracterizes the record. The July 14 dismissal order does not cite any provision of the Federal Rules. The basis for the dismissal order is the stipulation in the July 13 settlement agreement. Pet. App. 70a. In substance, the settlement agreement is the stipulation of the parties. Thus, the dismissal order meets the requirements of Fed. R. Civ. P. 41(a)(1), contrary to Respondents' claim.

Third, the settlement agreement does not state that the July 14 dismissal order is to be delayed for 45 days as Respondents claim. Pet. App. 68a-74a. If Respondents thought the entry of the dismissal order should have been delayed by 45 days or the dismissal with prejudice was improper, they should have presented this issue in the district court on a Fed. R. Civ. P. 60(b) motion. The fact that Respondents chose not to file such a motion precludes them from making this argument at this late date. Sup. Ct. R. 14(1)(g)(i).

Finally, the July 14 dismissal order is not an administrative closing. Administrative closings are a method "used in various districts throughout the nation in order to shelve pending, but dormant cases." *Lehman v. Revolution Portfolio LLC*, 166 F.3d 389, 392 (1st Cir. 1999) (citations omitted). *See also* 12 James Wm. Moore et al., *Moore's*

Federal Practice ¶ 60.24 (3rd Ed. 2001) ("[a]n administrative closing may be ordered, for example, in order to await the lifting of the automatic stay imposed by the Bankruptcy Code, or when prosecution of suit must be deferred indefinitely to permit the completion of an arbitration proceeding"). When this point was raised in the district court after Realty One moved to dismiss the motion to enforce for lack of jurisdiction, it was overruled and not presented in the court of appeals. J.A. 1405-07, 1515-18, Pet. App. 43a-46a, 79a. The reason is clear: an order which directs "that the docket be marked, 'settled and dismissed with prejudice' " is not an administrative closing order, it is an order of dismissal with prejudice.

3. Respondents' litany of incorrect and irrelevant facts should be seen for what it is: subterfuge in an apparent effort to cloud the important issue of federal jurisdiction presented here. For example, there was no direct evidence of a conspiracy. The mistrial was not granted *sua sponte* but with the specific agreement of their counsel who stated: "we agree with the Court at this point in that it's time to declare a mistrial" and after the jury recanted its initial finding that there was an agreement based on a corrected instruction of law. J.A. 1742. The court gave the jury the corrected instruction after counsel for all parties submitted additional proposed instructions because a jury note to the court indicated they had misinterpreted an instruction earlier and relied on that misunderstanding to conclude that there was an agreement (the finding they recanted later). Respondents were not deprived of the benefit of the settlement since it is undisputed that Realty One paid the sums stated in the settlement agreement and complied with all business

terms. Pet. App. 10a. Any issues concerning additional contract provisions can, if necessary, be litigated in the appropriate state court.

In any event, these and other similar assertions are irrelevant. The issue before the Court is the district court's improper assertion of jurisdiction over a motion to enforce a settlement agreement when the order which dismissed the case with prejudice does not incorporate the settlement agreement into it or specifically retain jurisdiction to enforce the settlement agreement. The extraneous issues raised by Respondents are not relevant to this fundamental question.

4. Respondents' claim that this case is not important and worthy of this Court's consideration because the decision below will not "discourage settlements" misses the mark. Res. 9. The district court's assertion of jurisdiction beyond the limits established by the Constitution and the congress is clearly of fundamental importance. Concomitantly, the exercise of that improperly asserted judicial power to encroach on traditional state court jurisdiction – the power to hear contract disputes – and the sole right of parties to a lawsuit to agree, disagree, negotiate, and enter into – or not enter into – any agreement they deem appropriate to resolve that lawsuit presents a fundamental and important question.

In sum, the question presented for resolution here is of fundamental importance because: 1) it concerns the limits of federal judicial power and whether district courts can, on their own, extend those limits; 2) it impacts the relation between federal and state courts since the latter traditionally hear simple contract disputes such as

this; and 3) it impacts on the settlement of federal lawsuits since parties will undoubtedly be reluctant to enter into settlement agreements in those courts if the district court can assume the role of the parties and rewrite their agreements as was done here. Ultimately, this case involves the question of whether the Constitution and congress define the limits of the district court's judicial power and whether the distinct court is required to follow those limits as defined by this Court in decisions such as *Kokkonen*. We submit that this question, and the split in the circuits which has resulted from the decision below, are fundamental questions squarely presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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